Supreme Court, U.S.
FILED

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No.

In the

Supreme Court of the United States

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776,
Petitioner,

v.

RITE AID OF PENNSYLVANIA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR WRIT OF CERTIORARI

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June 2010

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QUESTION PRESENTED

Whether Litton Financial Printing Division v. National Labor Relations Board, 501 U.S. 190 (1991) narrowed the Steelworkers Trilogy, such that federal courts can determine the merits of a grievance dispute, and deny arbitration, even though the subject matter in dispute is encompassed by the broad arbitration clause in an existing collective bargaining agreement?

CORPORATE DISCLOSURE STATEMENT

Petitioner United Food and Commercial Workers Union, Local 1776 is a labor organization. There is no parent or publicly-held company owning 10% or more of petitioner's stock.

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United Food and Commercial Worker's Union, Local 1776 respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Third Circuit.

OPINIONS BELOW

The decision of the court of appeals is reported at 595 F.3d 128 and is reproduced in the Appendix herein at App. A, 1a-48a. The decision of the U.S. District Court for the Middle District of Pennsylvania is unofficially reported at 2009 U.S. Dist. LEXIS 27825 (M.D. Pa., Mar. 31, 2009) and is reproduced in the Appendix at App. B, 51a-78a.

JURISDICTION

The judgment of the court of appeals was issued on February 16, 2010. App. A, 49a-50a. Petitioner's timely petition for rehearing en banc was denied on March 16, 2010. App. D, 83a-84a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301 of the Labor Management Relation Act, as amended, 29 U.S.C. § 185(a), provides:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the

amount in controversy or without regard to the citizenship of the parties.

STATEMENT OF THE CASE

This case raises the issue of whether this Court's decisions in AT & T Technologies, Inc. v. Communications Workers of America, 475 U.S. 643 (1986)("AT &T"), and the Steelworkers Trilogy,[1] were narrowed by Litton Financial Printing Division v. National Labor Relations Board, 501 U.S. 190 (1991).

In AT & T, the Supreme Court held that federal courts are not to resolve, or inquire into, the merits of a grievance in determining whether a particular dispute is subject to a broad arbitration clause contained in an existing contract. Nevertheless, the court below denied the Union access to arbitration regarding its "additional stores" grievances based on the court's interpretation of the collective bargaining agreement, in reliance on Litton. This unfounded erosion of the presumption of arbitrability embedded in a broad arbitration agreement undermines federal labor policy as embodied in the decisions of this Court.

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[1] United Steelworkers of America v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960), United Steelworkers of America v. Enterprise Wheel & Car Corp., 363 U.S. 593 (1960); and United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960).

I. STATEMENT OF FACTS

A. Background - The Collective Bargaining Agreement

United Food and Commercial Workers Union, Local 1776 ("Local 1776" or "Union") and Rite Aid of Pennsylvania, Inc. ("Rite Aid" or "Company") are parties to three collective bargaining agreements (collectively the "CBA") in twenty-four counties in Eastern Pennsylvania.[2] The CBA contains an "additional stores clause" within the Recognition Article. The "additional stores" clause, in the Union's view, obligates Rite Aid to recognize Local 1776 as the representative of employees in newly opened or acquired stores within the geographic coverage of the CBA. The "additional stores" clause provides:

> The Employer recognizes the Union as the sole and exclusive bargaining agent for the purpose of bargaining in the Bargaining Unit . . . for: [a]ll full time and part time selling and non-selling associates employed at the Employer's retail stores (except as hereinafter excluded) within the counties [listed in each CBA].

App. A, 30a.[3]

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[2] Because the relevant language in each of the three CBAs at issue in this case is identical, this Petition will refer, for ease of reference, to a single "CBA", as did the court of appeals below. App. A, 3a, n. 1, 20a, n.1.

[3] The CBA also contains provisions requiring: (a) Rite Aid to give Local 1776 representatives access to stores within the geographic coverage of the CBA under certain circumstances ("the store

There is no dispute that the CBA also contains a "broad" arbitration clause, which permits the Union to submit unresolved grievances to arbitration. App. A, 6a. The only matters not subject to arbitration are "any grievance that does not involve the interpretation of any provision of this agreement," App. A., 8a, 25a, and "[a] breach of [the] no-strike clause...", App. A. 46a, n. 22. Neither exemption from the agreement to arbitrate is implicated in this dispute.

B. Development and Application of "Additional Stores" Clauses in the Retail Industry

"Additional stores" clauses (also known as "Kroger clauses") are well known in collective bargaining agreements arising out of the retail industry. Originally, they arose out of the National Labor Relations Board's ("NLRB" or "Board") general rule that the appropriate unit for collective bargaining in that industry should be determined by the scope of the employer's administrative division or geographic area. Daw Drug Co., Inc., 127 NLRB 1316, 1319 (1960); Safeway Stores, Incorporated, 96 NLRB 998, 1000 (1951).

Later, finding that a single store in a retail chain is a presumptively appropriate unit for bargaining, the Board held that it is an unlawful interference with employee rights for a collective bargaining agreement to automatically be applied to new stores within the geographic scope of a recognition clause. Haag Drug

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access clause"), App. A, 12a, and (b) Rite Aid to continue "privileges" granted by it under certain circumstances (the "privileges clause"), App. A, 13a.

Company, 169 NLRB 877, 877 (1968). Also see Melbet Jewelry Co., Inc., 180 NLRB 107, 109 (1969).

Thereafter, with Houston Division of the Kroger Co., 208 NLRB 928 (1974) ("Kroger I"), the Board referred to such recognition clauses as an "additional store" clause. In Kroger I, the Board held that such clauses did not require an employer to recognize a union as the representative of employees at a new store within the geographic scope of the clause, even if the union could demonstrate through objective evidence that it represented a majority of the employees at that store. 208 NLRB at 929. The Court of Appeals for the District of Columbia Circuit reversed, and held that additional stores clauses "can only be interpreted to mean that the employer waives its right to a Board ordered election." Retail Clerks International Association, Local No. 455 v. NLRB, 510 F.2d 802, 806 (1975). However, the Court of Appeals refrained from deciding what procedures should be followed when implementing the employer's promise in the additional stores clause to recognize the Union:

> The specific non-election recognition procedures which the clauses permit is a matter for the parties to consider in the first instance and we express no opinion whether authorization cards or other procedures may be utilized or objected to consistent with the clauses in issue here.

Id. at 806 (footnote omitted).

On remand, the NLRB agreed that "additional store" clauses are indeed "contractual commitments by the Employer to forgo its right to resort to the use of the Board's election process in determining the Union's

representation status in these new stores." Kroger Co., 219 NLRB 388, 389 (1975) ("Kroger II").

Kroger II, then, creates an ambiguity in any collective bargaining agreement which contains an additional stores clause, including the instant case: the clause does not mean what it literally says, because "automatic recognition" of new stores under the clause is unlawful. Rather, the "gloss" placed on an additional stores clause by Kroger II requires the employer to grant recognition to the union party to the contract upon completion of a procedure which, because it is not specified or defined by the Board or the courts, is defined by the parties.

Since the Board's decision in Kroger II, labor arbitrators have considered cases involving this administratively created contractual ambiguity – i.e., what procedures and rights are created to effectuate the recognition of the union in "additional stores" – on a number of occasions. In each such case, arbitrators have looked to the past practices of the parties to uniformly find that additional stores clauses give a contracting union an implied right of access to newly opened or acquired stores within the geographic scope of the clause, for the purpose of establishing its majority by soliciting employees to become members of the union. App. A, 33a-34a, n. 14. In at least one such case, the arbitrator's award was enforced by a federal court. App. A, 34a.

The underlying grievances in this matter thus presented the exact same questions considered by labor arbitrators in other circumstances pursuant to "additional stores" clauses.

C. Local 1776's Grievances and Demand for Arbitration

For decades preceding the instant dispute, Rite Aid observed a practice of granting union representatives access to newly-opened and acquired Rite Aid stores within the geographic scope of the CBA to solicit employee interest in the Union. App. A, 21a, n. 11.[4]

However, Rite Aid departed from these historic practices in 2007, when it acquired a drugstore chain formerly operated by Brooks Eckerd ("Eckerd"). Following the June 2007 acquisition of the Eckerd chain, Local 1776 representatives attempted to enter six of the former Eckerd stores, which were located within the geographic scope of the CBA with Rite Aid. The Union sought to enter the newly acquired stores to solicit employee interest in unionization. However, Rite Aid refused to allow Local 1776 representatives to enter the new stores. App. A, 20a.

In November 2007, Local 1776 filed three identical grievances, alleging that Rite Aid had "interfered with the Union's 'exercise of [its] visitation rights as prescribed under the [CBA].'" App. A, 20a. After Rite Aid denied the grievances, Local 1776 advised Rite Aid of its intent to submit the grievances to labor arbitration, and Rite Aid filed a complaint seeking a declaratory judgment that the grievances were not

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[4] The District Court granted Rite Aid's request for a declaratory judgment that the Union's grievance was not arbitrable under FRCP 56, ruling as a matter of law. In so doing, "courts are required to view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" Scott v. Harris, 550 U.S. 372, 378 (2007).

arbitrable. App. A, 21a. At present, the grievances are currently at arbitration, awaiting the outcome of this litigation. App. A, 4a, n. 2.

II. PROCEEDINGS BELOW

On March 31, 2009, the District Court, relying on this Court's decision in Litton, analyzed the various contractual provisions relied upon by the Union in the grievance, and concluded, based on the court's evaluation of the merits of those grievances, that they "did not relate to" the cited provisions, and therefore were "'not susceptible of an interpretation that covers the asserted dispute.'" App. B, 77a-78a. Therefore, the District Court granted Rite Aid's Motion for Summary Judgement, and declared that the grievances were not arbitrable. App. B, 78a.[5]

The Court of Appeals below affirmed, in a 2-1 opinion. The Panel majority concluded that Litton authorized judicial inquiry into the merits of the Union's contractual claims. App. A, 16a. On the merits of the contract interpretation dispute, the Panel

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[5] Two other labor organizations, 1199 SEIU and United Food and Commercial Workers Union, Local One, had collective bargaining agreements with Rite Aid in bargaining units located in New York State which also contained additional stores clauses. These two unions also sought arbitration over the Company's refusal to provide access to newly acquired Brooks Eckerd stores within the geographic scope of those contracts. In both cases, Rite Aid unsuccessfully opposed arbitration on the same grounds as asserted in this case. See Rite Aid of New York, Inc. v. United Food and Commercial Workers Union, Local One, 2009 U.S. Dist. LEXIS 5198 (W.D.N.Y. Jan. 23, 2009); 1199 SEIU v. Rite Aid Corp., 2008 U.S.Dist.LEXIS 22679 (S.D N.Y. Mar. 24, 2008). Rite Aid did not appeal either decision.

concluded that "a right of Union access to newly acquired stores simply cannot be plausibly derived from the [additional stores] clause", and stated that arbitration decisions in other similar cases were not "persuasive." App. A, 11a. Accordingly, the court concluded that because the additional stores clause "was not susceptible of an interpretation which would yield such a right" (of access, as claimed by Local 1776), the grievances were correctly found not to be subject to arbitration. App. A, 12a.

In dissent, Judge Ambro argued that the court's analysis was not "authorized by either Supreme Court precedent" or existing circuit precedent, as set forth in the Steelworkers Trilogy and AT&T. App. A, 19a. The dissent concluded that reliance on Litton to review the merits of the grievance was misplaced, because Litton arose in the context of an expired contract, while the grievance in the current case arose during the contract's term. App. A, 41a. Therefore, Judge Ambro concluded that the court's review of the merits of the grievance was not authorized by those cases, and thus the Third Circuit had incorrectly conflated the merits of the dispute with the question of whether the parties had agreed to arbitrate the subject matter of the dispute: "such analysis veers impermissibly into the merits of the underlying grievances, and fails to heed the Supreme Court's warning that courts not 'become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause.'" App. A, 47a-48a (citing Warrior & Gulf, 363 U.S. at 585).

REASONS FOR GRANTING THE WRIT

The Third Circuit's decision will foster renewed litigation over issues of federal labor law long settled by the Steelworkers Trilogy. The decision below will encourage the proliferation of challenges to the arbitrability of grievances based on federal court assessment of the underlying merits of disputes, contrary to this Court's precedent. Review is warranted to resolve the ambiguity and confusion arising out of Litton, in order to provide clear guidance to the federal courts regarding inquiries into the merits of grievances arising from an existing collective bargaining agreement.

I. This Court's Decision in Litton Does Not Permit the Consideration of the Merits of Grievances Arising Under a Broad Arbitration Clause of an Existing CBA.

In AT & T Technologies, this Court unanimously held that the "precepts" set out in the Steelworkers Trilogy "have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability." AT & Technologies, 475 U.S. at 648. The Court reiterated the analysis that federal courts must adhere to in deciding whether a grievance is arbitrable:

> 3) "[I]n deciding whether the parties have agreed to submit a particular grievance to

> arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, **indeed even if it appears to the court to be frivolous**, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator;"
>
> 4) "**[W]here the contract contains an arbitration clause, there is a presumption of arbitrability** in the sense that "[an] order to arbitrate the grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. **Doubts should be resolved in favor of coverage.**"

AT&T, 475 U.S. at 648-650 (citations omitted) (emphasis added).

In this case, however, the Third Circuit's decision departed completely from the required analysis. First, as set forth in AT&T, the analytical focus in matters such as this must be on whether the *subject matter* of the grievance is within the scope of the arbitration clause, 475 U.S. at 651, and not on the underlying merits of the grievance. If a grievance asserts a "claim which on its face is governed by the contract," then the subject matter of the grievance must deemed to be within the scope of a broad arbitration clause. American Manufacturing Co., 363 U.S. at 568. Even though the Union's grievance asserted claims which

were "governed by the contract," and the CBA in this case indisputably contains a broad arbitration clause, with no exclusions on its face, the Third Circuit nevertheless ruled that the grievance is non-arbitrable.

Analytically, the Third Circuit actually applied an entirely different and new test for determining arbitrability: whether the Union's grievance "rais[es] **a legitimate question** of the CBA's interpretation." App. A, 8a (emphasis added). However, the "legitimate question" test is plainly foreclosed by AT&T and prior decisions, because it requires judicial evaluation of the merits of the Union's grievance. As the Court stated fifty years ago:

> The collective bargaining agreement calls for the submission of grievances in the categories which it describes, irrespective of whether a court may deem them to be meritorious. . . . The function of the court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract. Whether the moving party is right or wrong is a question of contract interpretation for the arbitrator. In these circumstances the moving party should not be deprived of the arbitrator's judgment, and all that it connotes that was bargained for.

American Manufacturing, 363 U.S. at 567-68.

The Third Circuit justified its intrusion into the traditional authority of the labor arbitrator,

contending that Litton permits examination of the merits of the Union's grievance because the "merits and arbitrability questions are inextricably intertwined." App. A, 18a. However, Litton is plainly inapposite because it arises in a completely different context from the present case.

The instant dispute involves grievances arising during the term of an ongoing CBA. Litton, by contrast, concerns the extent to which grievances filed after the expiration of a CBA could nevertheless be arbitrable. See Litton, 501 U.S. at 193 (case involves "whether a dispute over layoffs which occurred well after expiration of a collective-bargaining agreement must be said to arise under the agreement despite its expiration"). As this Court observed in Litton, some contractual obligations expire with the CBA, and some survive its expiration. Therefore, a more piercing inquiry into the content of a grievance is permitted by Litton *where the contract has expired,* in order to avoid a situation where arbitration could in effect resuscitate expired contractual obligations.

This Court has never suggested that the limited review of the merits permitted in the context of an expired agreement in Litton was applicable to disputes arising during the life of a CBA, or that the holding in Litton was in any way intended to undercut its previous holdings in the Steelworkers Trilogy and AT& T. Nevertheless, the Third Circuit's holding in this case is the latest in a growing body of decisions from the Circuit Courts of Appeal that have permitted an examination of the merits of the grievance to determine arbitrability despite the presence of a broad arbitration clause in an existing contract. See International Brotherhood of Electrical Workers, AFL-

CIO, Local 1 v. GKN Aerospace North America, Inc., 431 F.3d 624 (8th Cir. 2005); Independent Lift Truck Builders Union v. Hyster Company, 2 F.3d 233 (7th Cir. 1993).

The Third Circuit's decision in this case is the latest, and most expansive, reading of Litton. If permitted to stand, the Third Circuit's decision will create a wide-ranging authority for federal courts to resolve the merits of a labor dispute arising under an existing CBA, in the guise of determining arbitrability. Such unprecedented enlargement of the federal court role plainly usurps the expertise of the labor arbitrator that the parties to collective bargaining agreements bargained for, and disrupts the stability of labor-management relations.

In his dissenting opinion below, Judge Ambro observed that the Third Circuit's decision in this matter will throw open the gates to arbitrability challenges, as courts:

> [W]ill presumably conclude that they may examine the merits of every grievance and, upon determining that the arbitration proponent's interpretation of the bargaining agreement is not sufficiently "plausible," refuse to compel arbitration.

A. 52. See also GKN Aerospace, 431 F.3d at 632 ("The union had a right, pursuant to the collective bargaining agreement, to grieve and arbitrate the rights of the employee. The company had a similar obligation and should not now be permitted to avoid this responsibility. The union may win or lose at

arbitration, but it deserves a chance.") (Heaney, J., dissenting).

II. If Unreviewed, The Third Circuit's Decision Will Lead to Frequent Arbitrability Challenges to Garden Variety Labor Relations Disputes, Contrary to the Steelworkers Trilogy

This case presented the lower courts with a "garden variety" labor relations dispute, raising the type of issues of past practice and industry custom that are routinely resolved by labor arbitrators every day. The Union's grievances here sought interpretation of rights arising under provisions that are indisputably a part of an ongoing CBA.

Whether the recognition procedure created by the Union and the Company in the aftermath of the NLRB's Kroger II decision includes a right for the Union to access new stores is a matter left to the parties to collective bargaining agreements containing "additional stores" clauses. Regardless of whether the Union's claims are substantial and meritorious, or not, the *subject matter* of the claim is part and parcel of the contractual provisions cited in its grievances, and the interpretation it seeks to advance in arbitration.

In this regard, the Union relied on the collective bargaining parties' decades-long practice under the clauses in dispute, as well as decisions issued by labor arbitrators familiar with the retail store industry regarding the exact contractual dispute in this case. Instead of referring this matter to arbitration, the Third Circuit instead rendered its own interpretation of the contractual clauses at issue, and rejected out of

hand as "unpersuasive" the decisions of experienced labor arbitrators regarding the same dispute.[6]

The Steelworkers Trilogy and its progeny teach that such judicial intervention is not only unwarranted, but it is contrary to the national labor policy which favors arbitration of collective bargaining disputes. For example, this Court stated that "[t]he federal policy favoring arbitration of labor disputes is firmly grounded in congressional command." Gateway Coal v. United Mine Workers of America, 414 U.S. 368, 377 (1974). The Court observed that Section 203(d) of the Labor Management Relations Act provides that:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement.

Id. at 377 (citing 29 U.S.C. § 173(d)) (emphasis added).[7]

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[6] As this Court observed in Warrior & Gulf, "[t]he labor arbitrator performs functions which are not normal to the courts; the considerations which help him fashion judgments may indeed be foreign to the competence of courts" as they are "not confined to the express provisions of the contract, as the industrial common law – the practices of the industry and the shop – is equally a part of the collective bargaining agreement although not expressed in it." Warrior & Gulf, 363 U.S. at 581-82.

[7] The broad arbitration clause in this case, which permits arbitration of grievances so long as they "involve the interpretation of any provision of [the CBA]", tracks this statute.

In sum, both the analytical framework and outcome of the analysis by the Third Circuit is inconsistent with this Court's precedent and federal policy. The Union here has been deprived of the opportunity to present its grievance and evidence before the labor arbitrator that it bargained for, due to unwarranted judicial intervention into the merits of what is an otherwise ordinary labor dispute over the meaning of contract language, and the past practices that animate that language.

Under the Third Circuit's analysis, it is hard to imagine any dispute in which a party relies on past (or industry) practice to give meaning to ambiguous contract language which will not be subject to the review on the merits engaged in by the court below. See Warrior & Gulf, 363 U.S. at 580 ("[g]aps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement"). Such a result will not only throw the settled expectations of parties to collective bargaining agreements into turmoil, it will undermine the federal law of labor relations created by this Court in the Steelworkers Trilogy.

CONCLUSION

Therefore, for the above reasons, the Petitioner respectfully submits that the petition for a writ of certiorari to the United States Court of Appeals for the Third Circuit should be granted.

Respectfully submitted,

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JUNE 2010

APPENDIX

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APPENDIX A

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1989

[Filed February 16, 2010]

RITE AID OF PENNSYLVANIA, INC.	)
	)
vs.	)
	)
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776, Appellant.	)
	)

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 08-33)
District Court Judge:
Honorable Christopher C. Conner

Argued November 10, 2009

Before: AMBRO, GARTH,
and ROTH, Circuit Judges

(Opinion Filed: February 16, 2010)

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OPINION OF THE COURT

GARTH, Circuit Judge:

In this appeal, we must decide whether the parties had agreed to arbitrate a labor dispute, thereby rendering it arbitrable under the parties' collective bargaining agreement. The District Court concluded that they had not, and we will affirm.

I.

Rite Aid of Pennsylvania, Inc. ("Rite Aid") operates a chain of drugstores in Pennsylvania. United Food and Commercial Workers, Local 1776 ("the Union") represents non-managerial employees in Rite Aid's eastern Pennsylvania stores. Rite Aid and the Union are parties to three separate collective bargaining

agreements (CBAs) covering Rite Aid stores in twenty-four Pennsylvania counties.[1]

In 2007, Rite Aid acquired a chain of drugstores formerly operated by Brooks Eckerd. The employees of the newly-acquired stores were not yet represented by the Union. When Union representatives attempted to enter six of the new stores in September 2007, Rite Aid denied them entry.

On November 7, 2007, the Union filed three identical grievances (one under each CBA), asserting that the CBAs conferred upon the Union a right to access newly-acquired or newly-opened stores within each CBA's geographic jurisdiction. Rite Aid denied the grievances, citing a policy against solicitation. The Union referred the three grievances to arbitration, where they were consolidated into a single proceeding, and a hearing date was set.

Prior to the arbitration hearing, Rite Aid filed an action in the United States District Court for the

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[1] One CBA covers the Northeast Division, which comprises Lehigh, Northampton, Northumberland, Montour (erroneously given as "Monture" in the CBA), Carbon, Wayne, Monroe, Wyoming, Susquehanna, Luzerne, Columbia, Sullivan, Lycoming, Lackawanna, and Pike counties. The Philadelphia Division agreement covers Rite Aid stores in Philadelphia, Delaware, Bucks, Montgomery, and Chester counties. The Reading Division CBA extends to stores in Schuylkill, Lancaster, Berks and Lebanon counties.

The parties agree that the three CBAs are identical in all respects relevant to this appeal. For the sake of convenience, we will therefore refer to "the CBA" as though there were a single agreement between Rite Aid and the Union.

Middle District of Pennsylvania, seeking a declaratory judgment of the grievances' non-arbitrability. On July 1, 2008, the parties filed cross-motions for summary judgment.

Rite Aid argued that the grievances were not arbitrable in light of Section 11.4 of the CBA, which provides: "No grievance shall be filed by the associate or the Union, nor need the Employer entertain any grievance that does not involve the *interpretation of any provision of this Agreement*." (emphasis added). The Union responded by citing three CBA provisions under which it purported to assert its store-access grievances. The Union argued that because its grievances arose under at least one of those provisions, arbitration was required, regardless of the grievances' merits.

On March 31, 2009, the District Court granted Rite Aid's motion and denied the Union's motion. The court found that the grievances did not involve the interpretation of any CBA provisions, and that they therefore fell outside the scope of the CBA's arbitration clause. The Union filed a timely notice of appeal.[2] We have jurisdiction pursuant to 28 U.S.C. § 1291.

II.

The District Court's decision regarding the applicability and scope of the parties' arbitration agreement is subject to our plenary review. United Steelworkers of Am. v. Rohm and Haas Co., 522 F.3d

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[2] The consolidated grievances remain in arbitration pending the outcome of this appeal.

324, 330 (3d Cir. 2008); Harris v. Green Tree Financial Corp., 183 F.3d 173, 176 (3d Cir. 1999).[3] In reviewing a District Court ruling on a motion for summary judgment, we apply the same test District Courts are to apply under Fed. Rule. Civ. P. 56(c). Brown v. J. Kaz, Inc., 581 F.3d 175, 179 (3d Cir. 2009). Summary judgment is appropriate if and only if, after the evidence taken as a whole is construed in the light most favorable to the non-moving party, there remains no genuine issue of material fact. Prowel v. Wise Business Forms, Inc., 579 F.3d 285, 286 (3d Cir. 2009).

The venerable legal principles guiding the construction and enforcement of arbitration clauses in collective bargaining agreements are well established. We have often recognized the strong federal policy in favor of resolving labor disputes through arbitration. See, e.g., United Parcel Service, Inc. v. Int'l Brotherhood of Teamsters, Local Union No. 430, 55 F.3d 138, 141 (3d Cir. 1995); Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp., 26 F.3d 375, 399 (3d Cir. 1994); Exxon Shipping Co. v. Exxon Seamen's Union, 11 F.3d 1189, 1196 (3d Cir. 1993). More specifically, the inclusion of a broad arbitration clause in a collective bargaining agreement gives rise to a presumption of arbitrability which may be rebutted

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[3] In earlier cases, we had treated a District Court's arbitrability decision as a finding of fact with respect to the parties' intent to arbitrate a particular dispute, and reviewed only for clear error. See Lukens Steel Co. v. United Steelworkers of Am., 989 F.2d 668, 672 (3d Cir. 1993); John F. Harkins Co., Inc. v. Waldinger Corp., 796 F.2d 657, 659-60 (3d Cir. 1986). In Rohm and Haas, however, we clarified that this more deferential standard applies only where the relevant documents are ambiguous. See 522 F.3d at 330 n.7.

only by "the most forceful evidence of a purpose to exclude the claim from arbitration." AT&T Techs., Inc. v. Comm's Workers of Am., 475 U.S. 643, 650 (1986) (quoting United Steelworkers of Am. v. Warrior & Gulf Nav. Co., 363 U.S. 574, 585 (1960)). The parties agree that the arbitration provisions in the CBA at issue are broad, and that the presumption of arbitrability therefore applies in this case.

Notwithstanding that presumption, "arbitration is still a creature of contract and a court cannot call for arbitration of matters outside of the scope of the arbitration clause." Rohm and Haas Co., 522 F.3d at 332. Unless the parties clearly provide otherwise, the courts, not the arbitrators, are tasked with interpreting agreements in order to determine whether the parties have indeed agreed to arbitrate disputes whose arbitrability is contested. See AT&T Techs., 475 U.S. at 649, 651; Local 827 v. Verizon New Jersey, Inc., 458 F.3d 305, 309 (3d Cir. 2006). In making that determination, a court is not to examine the potentialmerits of the claim sought to be arbitrated, except as we point out in Part IV, where the claim's merits and its arbitrability are inextricably intertwined. See Lukens, 989 F.2d at 672. Rather, the court is limited to the construction of the arbitration clause and any contractual provisions relevant to its scope, as well as any other "forceful evidence" suggesting that the parties intended to exclude the disputes at issue from arbitration. See E.M. Diagnostic Sys., Inc. v. Local 169, 812 F.2d 91, 95 (3d Cir. 1987).

Where an arbitration clause in a collective bargaining agreement limits arbitration to those disputes which require interpretation of the agreement, as it does here, a grievance is excluded

from arbitration unless it arises from a specific provision in the agreement. See Rohm and Haas, 522 F.3d at 332 ("Although we hold that the Bristol CBA's arbitration clause is broad, the underlying basis for the grievance submitted through the Bristol CBA grievance procedure must still arise from some specific article of the Bristol CBA."). We may not accept an arbitration proponent's citation to a particular provision of the CBA and its claim that the grievance arises thereunder without critical examination. Unquestioning acceptance of the Union's characterization of its claims is inconsistent with our duty to determine arbitrability because it "leaves the scope of the arbitration clause subject to the unilateral and unfettered discretion of the Union." E.M. Diagnostic, 819 F.2d at 95. We must determine whether indeed "the subject matter of the grievance is one that is within the zone of interests that have received protection in the collective bargaining agreement" and one that the parties have agreed to arbitrate. Id.

Having outlined the controlling principles, we turn now to their application to the grievances and arbitration clause in the present case.

III.

Article 11 of the CBA creates a procedure under which the Union or one of its members may file grievances with Rite Aid. The CBA provides for review of the grievance by progressively higher levels of Rite Aid management and, if the dispute is not amicably

resolved, ultimately for resolution of the dispute by an arbitrator.[4]

As noted supra, the scope of the arbitration provision in the CBA is broad but not unbounded. Section 11.4 of the CBA provides: "No grievance shall be filed by the associate or the Union, nor need the Employer entertain any grievance that does not *involve the interpretation of any provision of this Agreement.*" (emphasis added). Thus, the plain language of the CBA indicates that the parties have agreed to arbitrate only those disputes which genuinely implicate one or more provisions of the CBA. Our task is therefore to decide whether the Union's store-access grievance falls within the scope of the arbitration clause by raising a legitimate question of the CBA's interpretation.

The Union points to three provisions of the CBA, contending that each provides a basis for its claim that Union representatives are entitled to access Rite Aid's newly-acquired stores and their employees. We examine each in turn.

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[4] Under Sections 11.1 and 11.2 of the CBA, grievances are first to be filed with the store manager, and if not resolved within two days, next submitted to a Rite Aid Human Resources Manager. If the dispute is not resolved in the following three days, it is presented to Rite Aid's Director of Labor Relations. If the matter is still unresolved three days after that, the grievance is referred to arbitration. Under Section 11.3.1 (labeled Section 11.3 in the Philadelphia Division CBA), the arbitrator is selected jointly by the parties or, in the event the parties cannot agree, selected pursuant to the rules of the American Arbitration Association.

A. Recognition Clause

Section 2.1 of the CBA reads:

> The Employer recognizes the Union as the sole and exclusive bargaining agent for the purpose of bargaining in the Bargaining Unit in respect to rates of pay, wages, hours of employment, and other conditions pertaining to employment . . . .

The Union argues that its interpretation of this clause gives rise to its access grievance.

We are not persuaded by the argument the Union advances based on the decision of the National Labor Relations Board (NLRB) in Houston Div. of the Kroger Co., 219 N.L.R.B. 388 (1975). In Kroger the NLRB held that a recognition clause similar to the one at issue in this case waives an employer's right to demand an election in a new or after-acquired store, but that the union is nevertheless required to demonstrate majority support among employees of those stores before it can be recognized. Id. at 389. However, the NLRB did not specify the means by which unions are to demonstrate majority support in this situation. The Union here argues that the CBA at least arguably grants it a right of store access, and it is therefore entitled to present that claim to an arbitrator.

This strikes us as a non sequitur. The NLRB's failure to specify the means of establishing majority support in cases where the employer has waived its right to an election simply does not suggest that the Union must be allowed access to *newly-acquired stores*. The Union has not explained why any of the methods

that might meet the NLRB's approval would require its organizers to enter the store. If there is ambiguity in Kroger, it does not translate to ambiguity in the instant CBA.

The Union points to several arbitration decisions recognizing a right of access to newly-acquired stores, and contends that its present grievance must indeed involve interpretation of the recognition clause, since that interpretation has in fact been accepted by several arbitrators.[5]

Even were we to consider them, the merits decisions relied upon by the Union would not persuade us that the grievance is arbitrable. The Union calls our attention to a decision from the District of Oregon confirming an arbitration award under a CBA that *included* a provision specifically providing for the applicability of the CBA to new stores. The CBA in that case included the following provision: "The Employer agrees then *if the Employer should establish a new retail food store or stores located in Clark County, Washington*, and in the jurisdiction of Local 555, that as of the time such store is established this Agreement shall apply to all employees in job classifications setforth herein." Albertson's, Inc. v.

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[5] We find it rather curious that the Union charges the District Court with reaching the merits of the instant dispute in the course of declaring it non-arbitrable (see infra Part IV), while simultaneously urging us to consider favorable (to the Union) merits decisions as evidence of the dispute's arbitrability. The merits and arbitrability questions are distinct, and a court must limit itself to addressing the latter, regardless of whether the merits appear favorable or unfavorable to an arbitration proponent.

Local 555, Civil No. 97-977-JO, slip op. at 4 (D. Or. 1998) (emphasis added).

The CBA in the instant case contains no such provision.[6] To the extent that decisions of other arbitrators have found in favor of unions relying on the analysis of Kroger and the theory referred to above, we simply do not find them persuasive.

In our view, a right of Union access to newly acquired stores simply cannot be plausibly derived from the recognition clause. The recognition clause merely establishes the Union's position as Rite Aid's employees' exclusive bargaining agent and defines the range of matters subject to bargaining. It does not describe or purport to include anything resembling the Union's claimed right to access newly-acquired stores. The District Court correctly concluded that the

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[6] Another recent case submitted by the Union pursuant to Fed. R. App. P. 28(j), PPG Indus. v. Int'l Chemical Workers Union Council, 587 F.3d 648 (4th Cir. 2009), is inapposite. In PPG, the employer sought to vacate an arbitration award involving the interpretation of a term in a bonus plan that had been expressly incorporated into a CBA with a mandatory arbitration clause. Both parties agreed in PPG that the bonus plan was subject to the CBA's arbitration provisions; the employer merely disagreed with the arbitrator's interpretation of what the employer termed the "plain language" of the plan.

The District Court vacated the arbitration award, but the Fourth Circuit reversed, writing that "[t]he Company's argument simply constitute an attack on the *correctness* of the arbitrator's decision. A court has no warrant to determine the correctness of the arbitrator's award." Id. at 653. By contrast, in the instant case Rite Aid challenges only whether the Union's grievance is arbitrable inasmuch as neither Rite Aid nor the Union ever agreed to arbitrate the access issue.

recognition clause is not susceptible of an interpretation which would yield such a right.

B. Observation Clause

The Union next relies on Section 5.1 of the CBA, which provides in relevant part:

> It is agreed that the Union duties and activities will not be carried on during work. This shall not prevent the Union officials from entering the Employer's establishments to satisfy that this Agreement is being observed, provided that same shall not interfere with the normal operations or business of the store.

The Union argues that its grievance is arbitrable because it alleges that the Union's exclusion from the newly-acquired Eckerd stores violated this provision of the CBA.

We question the Union's reading of this provision, and its argument. The CBA cannot apply to the newly-acquired stores or to their employees because the Union does not presently represent those stores' employees. (This is, of course, the very reason the Union seeks access to the stores.) We agree with the District Court that it is not possible for the Union to ensure compliance with the instant CBA at stores to which the CBA does not apply. Accordingly, the Union's store-access grievance does not require interpretation of Section 5.1, the observation clause, and arbitration is not properlyinvoked by reliance on this provision.

C. Privileges Clause

Finally, the Union relies on Section 15.3, which provides:

> Only privileges which have been granted by the present Employer since its acquisition of the establishments covered by this Agreement shall be continued.

The Union alleges that before the acquisition of the Brooks Eckerd stores, Rite Aid had permitted it to enter other new stores. Thus, according to the Union, the right of access is a privilege that "shall be continued" under the CBA -- or, at the least, this interpretation is sufficiently plausible to conclude that the Union's grievancesindeed arise from an interpretation of the CBA.

A right of access cannot be considered one of the "privileges" referenced in Section 15.3 unless the clause's context and provisions are entirely ignored. Article 15 is titled "Miscellaneous Working Conditions," and all of its provisions deal with the rights and responsibilities of *employees* covered by the CBA. The privileges to which the CBA refers are not privileges of the Union. For example, Section 15.4 establishes the rules under which worked time is recorded; Section 15.5 requires Rite Aid to furnish employees' uniforms; Section 15.6 sets out the circumstances under which employees are to be held liable for cash shortfalls; Section 15.8 permits associates to transfer between the front end and pharmacy departments "in accordance with seniority and ability," and so forth.

The Union argues that this contextual analysis intrudes into territory reserved for the arbitrator. However, our recent precedent confirms our ability to consider the context of a CBA provision in order to determine whether it is sufficiently implicated by a grievance that one party seeks to arbitrate.

In Rohm & Haas, supra, the parties contested the arbitrability of a denial of disability benefits. Management and the employee's union had negotiated a Collective Bargaining Agreement containing an arbitration clause, but disability benefits were provided only under a separate ERISA plan lacking any arbitration provisions. The employee argued, inter alia, that his denial-of-benefits grievance arose under the Agreement because one provision of the agreement made reference to the ERISA benefits plan in describing the procedures to be followed in case of a disagreement over whether an employee should be considered physically incapable of working. 522 F.3d at 328 29.

We rejected this argument after examining the context, which revealed that the provision "contemplates a situation where an employee seeks to continue working in spite of a potential disability." Id. at 334. Because the employee did not propose to continue working, we found that the Agreement did not apply to the employee's grievance, and the denial-ofbenefits claim was therefore not arbitrable. We concluded: "We do not find any ambiguity in the [CBA] that would permit it to be reasonably interpreted to provide for disability benefits or to

provide for arbitrating a plan administrator's denial of such benefits arising from a separate ERISA plan."[7] Id.

Similarly here, the entire context of Section 15.3 makes clear that the "privileges" discussed in Article 15 pertain to Rite Aid's employees' working conditions. Article 15 has nothing to do with the Union's right to organize or to be recognized in newly-acquired stores. The Union's grievances as to store access simply do not involve an interpretation of Section 15.3, and thus do not come within the scope of the CBA's arbitration clause.

In sum, Section 11.4 of the CBA, which provides that "[n]o grievance shall be filed by the associate or the Union, nor need the Employer entertain anygrievance that does not involve the interpretation of any provision of this Agreement," constitutes "forceful evidence," particularly in light of the context that we have analyzed, that the parties intended to exclude from arbitration claims which arise wholly outside the scope of the CBA. The Union's store-access

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[7] Rohm & Haas is a recent opinion of this Court. As my dissenting colleague concedes, this Court was required to consider "*substantive provisions of the collective bargaining agreement* to determine whether, as the union argued, "disability benefits" are considered "working conditions" [under the collective bargaining agreement]." Dissent at n.18 (emphasis added). This being so, it is obvious that the merits may be considered when necessary to determine arbitrability. The dissent does not take issue with Rohm & Haas, as it cannot, because Rohm & Haas is a precedential opinion of this Court. Indeed, the dissent does not attempt to explain why we should not be bound by this very recent binding precedent. The dissent's discussion of Rohm & Haas, significant though it is, is confined to a single footnote. We are content to rely upon Rohm & Haas as a precedent in this Circuit.

grievance does not fall within the scope of the CBA's arbitration clause because it does not require the interpretation of any of the CBA's provisions.[8]

IV.

The Union additionally argues that the District Court impermissibly considered the merits of its grievance in making its arbitrability determination. We cannot agree. Decisions of the Supreme Court and Courts of Appeals have made clear that where the merits and arbitrability questions are inextricably intertwined, a court's arbitrability decision may, of necessity, touch incidentally on the merits.

In Litton Financial Printing Div. v. NLRB, 501 U.S. 190 (1991), the union representing Litton's employees sought to arbitrate a dispute over layoffs of ten workers, including Litton's six most senior employees. Like the CBA in this case, the Agreement contained an arbitration provision whose scope was limited to disputes "regarding [the] Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement." Id. at 194. The Litton CBA provided that, "in case of layoffs, lengths of continuous service will be the

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[8] We observe as did the District Court that Article 25 of the CBA provided Rite Aid with the right to "open new establishments of any kind." The Philadelphia Division version of the CBA also contained a Section 2.3, which required Rite Aid to "notify the Union of any new store openings or acquisitions within the five(5) county Philadelphia area." If the parties had intended a right of access to be encompassed by the CBA's arbitration clause, it surely would have appeared in the CBA in the context of these provisions. No such provision appears anywhere in the CBA.

determining factor if other things such as aptitude and ability are equal." Id. However, because the agreement had expired nearly a year before the layoffs occurred, Litton contested the grievance's arbitrability. The union argued that the seniority provision created a vested right which survived the expiration of the agreement, and thus the layoffs constituted violations of the agreement notwithstanding that they had occurred after expiration.

The Supreme Court ruled for Litton and held the grievance non-arbitrable. It noted that "[o]nly where [factors such as aptitude and ability] were equal was the employer required to look to seniority." Id. at 210. The Court reasoned: "The important point is that factors such as aptitude and ability do not remain constant, but change over time. They cannot be said to vest or accrue or be understood as a form of deferred compensation. . . . We cannot infer an intent on the part of the contracting parties to freeze any particular order of layoff or vest any contractual right as of the Agreement's expiration." Id. Only after it construed the disputed provision and determined that no rights were vested was the Court able to conclude that the grievance did not arise under the Agreement, and was thus non-arbitrable.

The Union in this case characterizes Litton as inapplicable because this case does not involve an expired CBA, but Litton is not so easily distinguished. Because the Agreement limited the scope of arbitration to matters regarding the agreement or its construction, the Supreme Court in Litton found it necessary to interpret the agreement in order to properly determine the question of arbitrability. The Union here would argue that the Supreme Court had accordingly reached

the merits, but because the merits and arbitrability issues were inextricably intertwined in Litton, the Supreme Court found it necessary to refer to the merits in order to determine what the parties had agreed to arbitrate.

We are presented with a similar situation in this case. In the words of the Supreme Court, "we must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement," even if we trench to some extent upon the merits. Id. at 209.

We are not the first Court of Appeals to read Litton this way, or to employ an analysis recognizing the entwining of the merits and agreed-upon arbitrability questions. Int'l Brotherhood of Elec. Workers v. GKN Aerospace N. Am., Inc., 431 F.3d 624 (8th Cir. 2005), involved a dispute over whether an employee who had been promoted to a supervisory position had a right to return to the bargaining unit. Because the arbitration provision was limited to matters related to the collective bargaining agreement, the Eighth Circuit held that the arbitrability determination required it to interpret various clauses of the agreement. See id. at 629-30. The court understood Litton to mean that "the judicial responsibility to determine arbitrability takes precedence over the general rule to avoid consideration of the merits of a grievance." Id. at 628.

In Independent Lift Truck Builders Union v. Hyster Co., 2 F.3d 233 (7th Cir. 1993), another case limiting arbitration to disputes arising out of a collective bargaining agreement, the Seventh Circuit

observed that "a court cannot address the arbitrability question without at the same time addressing the underlying merits of the dispute." Id. at 236. After discussing Litton, the court concluded: "If the court must, to decide the arbitrability issue, rule on the merits, so be it." Id. Indeed, both this court and our sister courts had conducted a similar analysis even before Litton. See E.M. Diagnostic, 812 F.2d at 95; United Steelworkers Local No. 1617 v. Gen. Fireproofing Co., 464 F.2d 726, 729 (6th Cir. 1972) ("In order to determine then whether the parties have agreed to arbitrate [the matter at issue], we must examine the collective bargaining agreement . . . to see if, under any reasonable interpretation, agreement to arbitrate can be found."); Peerless Pressed Metal Corp. v. Int'l Union of Electrical, Radio and Machine Workers, 451 F.2d 19, 21 (1st Cir. 1971) (holding a dispute arbitrable because it arose under a construction of an agreement that, while "weak," was not "impossible" or "inconceivable").

V.

We will affirm the District Court's judgment dated March 31, 2009, that the parties had not agreed to arbitrate the issue of access to the Eckerd stores and their employees.

AMBRO, Circuit Judge, dissenting

The Majorityconcludes that the Union's grievances are not arbitrable based on its assessment of the merits of the Union's claims. Because I do not believe that analysis is authorized by either Supreme Court precedent or our own precedent, I respectfully dissent.

I. Background

To review, United Food and Commercial Workers Union, Local 1776 (the "Union" or "Local 1776"), has represented Rite Aid employees in 24 Pennsylvania counties for several decades. In June 2007, Rite Aid acquired a drugstore chain formerly operated by Brooks Eckerd. Several of these storesarelocated in counties covered by a collective bargaining agreement (the "CBA")[9] between Ride Aid and Local 1776. During September and October 2007, representatives of Local 1776 attempted to enter six of these stores to solicit employee interest in joining the Union. Rite Aid barred these representatives from entering the stores.

In November 2007, Local 1776 Executive Vice President Nicholas Farina filed three identical grievances with Niels Hansen—Rite Aid's Director of Labor Relations—alleging that Rite Aid had interfered with the Union's "exercise of [its] visitation rights as prescribed under the [CBA]." Mr. Hansen denied the grievances, relying on Rite Aid's "no solicitation" policy. That policy—for which the effective date is unknown—prohibits the "[s]olicitation for any cause or distribution of material . . . if one or more of the Rite Aid Associates engaged in the interaction is on working time." The policy does not reference Union activities, but purports to apply to "associate and non-associate activity on behalf of any cause or organization, with the exception of Company-sponsored charity events."

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[9] Like the Majority, I refer to the parties' collective bargaining agreements as a single "CBA." Maj. Op. at 3 n.1.

When Local 1776 advised Rite Aid of its intent to submit the grievances to arbitration, Rite Aid filed a complaint in the federal District Court for the Middle District of Pennsylvania seeking a declaratory judgment that the Union's grievances were not arbitrable.[10] The parties filed cross-motions for summary judgment with supporting declarations.[11] In March 2009, the District Courtgranted Rite Aid's motion and denied the Union's motion. This appeal followed.

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[10] I note that at least two other courts have rejected Rite Aid's attempts to bypass arbitration of similar disputes. *See Rite Aid of N.Y., Inc. v. United Food and Commercial Workers Int'l Union Local One*, No. 07-cv-708, 2009 WL 185764 (W.D.N.Y. Jan. 23, 2009); *1199 SEIU, United Healthcare Workers East v. Rite Aid Corp* , No. 07-cv-4816, 2008 WL 762090 (S.D.N.Y. Mar. 24, 2008).

[11] The Union submitted the declaration of Executive Vice President Farina, in which he averred that: (1) prior to the current dispute, he was "not aware that Rite Aid had a [n]on-solicitation policy at any of its retail stores" within the counties covered by the CBA; and (2) Rite Aid "had, for decades, permitted [Union] representatives . . . to have access to both newly acquired and newly opened Rite Aid stores within the geographic jurisdiction of [the] CBA[], for the purpose of soliciting Rite Aid's employees for membership in [the Union]." Rite Aid submitted the declaration of Human Resources Manager Mark Firment—who has been employed by Rite Aid since February 2000—in which he averred that, "[t]o the best of [his] knowledge, information and belief, Rite Aid's [n]on-solicitation [p]olicy has been and continues to be consistently enforced throughout all of Rite Aid's stores, including, but not limited, to [the six Brooks Eckerd stores that Union members attempted to enter]." Mr. Firment's declaration did not address whether the policy has ever been applied to Union representatives seeking to enter Rite Aid stores to solicit membership.

II. The *Steelworkers* Principles

Fifty years ago, the Supreme Court decided three cases, collectively known as the "*Steelworkers* Trilogy," which establish the principles that guide our determination of whether a grievance is arbitrable. *See United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960). As the Supreme Court has observed, "[t]hese precepts have served the industrial relations community well, and have led to continued reliance on arbitration . . . as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986). Those precepts are as follows.

(1) "[A]rbitration is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf*, 363 U.S. at 582.

(2) Unless the parties "clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator." *AT&T Techs.*, 475 U.S. at 649 (*citing Warrior & Gulf*, 363 U.S. at 582–83).

(3) In deciding whether the parties have agreed to arbitrate a particular grievance, courts may "not . . . rule on the potential merits of the underlying claims." *Id.* The Supreme Court has stated this prohibition in forceful terms:

> Whether "arguable" or not, indeed *even if it appears to the court to be frivolous*, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious."

Id. at 649–650 (*quoting Am. Mfg. Co.*, 363 U.S. at 568) (emphasis added).

Thus, where the parties have agreed to "submit all questions of contract interpretation to the arbitrator," the court's function is "very limited"; "[i]t is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *Am. Mfg. Co.*, 363 U.S. at 567–68. This principle implements the "federal policy of settling labor disputes by arbitration[, which] would be undermined if courts had the final say on the merits" of a grievance. *Enter. Wheel & Car Corp.*, 363 U.S. at 596. Accordingly, "[a] court should view with suspicion an attempt to persuade it to become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause, when the alternative is to utilize the services of an arbitrator." *Warrior & Gulf*, 363 U.S. at 585.

(4) A presumption of arbitrability applies where a collective bargaining agreement contains an arbitration provision. This presumption is "particularly applicable" where, as here, the arbitration provision is broad. *AT&T Techs.*, 475 U.S. at 650 (arbitration provision that provided for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" was broad); *see also Warrior & Gulf*, 363 U.S. at 576 (arbitration provision that provided for arbitration of "differences . . . as to the meaning and application of the provisions" of the collective bargaining agreement was broad). "In such cases, '[i]n the absence of any express provision excluding a particular grievance from arbitration, . . . only *the most forceful evidence* of a purpose to exclude the claim from arbitration can prevail.'" *AT&T Techs.*, 475 U.S. at 650 (*quoting Warrior & Gulf*, 363 U.S. at 584–85) (emphasis added) (alteration in original).

III. Discussion

We have identified three questions to guide our application of the *Steelworkers* principles where the bargaining agreement's arbitration provision is broad and the presumption of arbitrability applies:

> (1) Does the present dispute come within the scope of the arbitration clause?[;] (2) does any other provision of the contract expressly exclude this kind of dispute from arbitration?[;] and (3) is there any other 'forceful evidence' indicating that the parties intended such an exclusion?

E.M. Diagnostic Sys., Inc. v. Local 169, Int'l Bhd. of Teamsters, 812 F.2d 91, 95 (3d Cir. 1987); *accord*

United Steelworkers of Am. v. Rohm and Haas Co., 522 F.3d 324, 331 (3d Cir. 2008). I address these questions in turn.

A. The Union's Grievances Come Within The Scope Of The Arbitration Provision

The parties' CBA contains a provision governing the procedure for the filing and arbitration of grievances, which states that "[n]o grievance shall be filed by . . . the Union, nor need [Rite Aid] entertain any grievance that does not involve the interpretation of any provision of this Agreement." This provision thus limits the grievances that the Union may file—and, if rejected by Rite Aid, refer to arbitration—to those that "involve the interpretation of any provision of" the CBA.

The Union's asserted right to enter Rite Aid stores for the purpose of soliciting membership is founded on its interpretation of three provisions of the CBA—the "Recognition," "Observation," and "Privileges" Provisions. Accordingly, the Union argues that its grievances fall within the "scope" of the CBA's arbitration mandate because it has made a claim which "on its face is governed by the [CBA]," *Am. Mfg. Co.*, 363 U.S. at 567–68—that is, on its face Local 1776's asserted right of store access "involve[s] the interpretation" of provisions of the CBA.

1. The Distinction Between The Subject Matter And The Merits Of A Grievance

The Union's characterization of its grievances is not the end of the matter. As the Majority points out, "[u]nquestioning acceptance of the Union's

characterization of its claims" would "'leave[] the scope of the arbitration clause subject to the unilateral and unfettered discretion of the Union.'" Maj. Op. at 7 (*quoting E.M. Diagnostic*, 812 F.2d at 95). The concern is that an arbitration proponent could achieve arbitration of a grievance—the subject matter of which is wholly outside the scope of the collective bargaining agreement—simply by "cit[ing] to a particular provision of the CBA," claiming that its "grievance arises thereunder," and contending that a court would be impermissibly reviewing the merits if it were to reject the Union's characterization. *Id.*

We addressed this concern in *E.M. Diagnostic*, where we considered the arbitrability of a grievance challenging a company's decision to subcontract work to an agency that did not employ members of the union. 812 F.2d at 92. Because the arbitration provision was broad,[12] we applied the presumption of arbitrability and concluded that the grievance was arbitrable, even though (1) the collective bargaining agreement there explicitly granted the company the right to subcontract, and (2) the grievance simply alleged that the employer's decision to subcontract was "unfair" and "a clear case of violating the contract." *Id.*

Despite our concluding thatthe grievance was arbitrable, we rejected the union's argument that its bare claim of a "violation" of the collective bargaining agreement was alone sufficient to make the dispute

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[12] The collective bargaining agreement at issue in *E.M. Diagnostic* provided for arbitration of "[a]ny dispute arising out of a claimed violation of [the collective bargaining agreement]." *Id.* at 92.

arbitrable, as "[s]uch an interpretation . . . leaves the scope of the arbitration clause subject to the unilateral and unfettered discretion of the Union." *Id.* at 95. Instead, we adopted the following test for determining whether a grievance comes within the "scope" of an arbitration provision:

> It will suffice for present purposes to hold that a claimed contractviolation comes within the scope of an arbitration clause of this character when the subject matter of the grievance is one that is *within the zone of interests that have received protection in the collective bargaining agreement*. To require more, we believe, would infringe upon territory reserved for arbitrators in *AT&T Technologies*.

Id. (emphasis added). Applying this test, we had "no difficulty" concluding that the union's subcontracting grievance fell within the "zone of interests" protected by the collective bargaining agreement. *Id.* at 96. We reasoned that though the agreement granted the company the right to subcontract, there must be "implicit" limits on that right; otherwise, the company could subcontract *all* work in the bargaining unit, which would be "inconsistent with the [collective bargaining] agreement's recognition of the Union as the bargaining agent for the Company's employees." *Id.*

Underlying our decision in *E.M. Diagnostic* is the crucial distinction between two inquiries: (1) whether a grievance comes within the "scope" of the arbitration provision (*i.e.*, whether its subject matter falls within "the zone of interests that have received protection" in the collective bargaining agreement); and (2) whether

the grievance itself has merit. In my view, distinguishing between these questions is critical to ensuring that we do not overstep our "very limited" role in determining whether a grievance must be arbitrated. *Am. Mfg. Co.*, 363 U.S. at 567.

To demonstrate, imagine a collective bargaining agreement that requires the employer to pay employees overtime wages for work in excess of 35 hours a week. Imagine further that the Union files a grievance challenging the employer's refusal to pay overtime wages for work in excess of 30 hours a week. In such a circumstance, we could rightfully characterize the Union's grievance as "frivolous," given the agreement's express language to the contrary. We could not, however, say that the "subject matter" of the grievance—*i.e.*, the circumstances in which the employer is required to pay overtime wages to its employees—falls outside the "zone of interests" that have received protection in the agreement. Rather, we are compelled to call for arbitration of the dispute because, although the grievance "appears . . . to be frivolous, the union's claim that the employer has violated the collective bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator." *AT&T Techs.*, 475 U.S. at 649–50. Indeed, a contrary position would "reduce[] to an assertion" that the obligation to pay overtime wages only for work in excess of 35 hours a week "is so clear on the face of the agreement that there is no need for arbitration," which is "but another way of saying that the Union's grievance is frivolous." *E.M. Diagnostic*, 812 F.2d at 97.

Contrast that situation with a grievance that, in addition to appearing frivolous, involves a subject matter wholly outside the scope of the collective bargaining agreement. For example, a grievance challenging an employer's "decision to terminate the distribution of Christmas turkeys to its employees," in the context of an arbitration provision that applies only to grievances involving "the interpretation and application of . . . specific provisions of [the collective bargaining agreement]" (which do not include a provision even remotely applicable to the employer's prior practice of distributing Christmas turkeys), is rightly regarded as being outside the "scope of . . . arbitrable matter[s]," in addition to being frivolous. *Boeing Co. v. Int'l Union, UAW*, 349 F.2d 412, 413 (3d Cir. 1965); *see also E.M. Diagnostic*, 812 F.2d at 96 n.2 (describing *Boeing Co.* as a case where "the subject matter of the union's grievance was wholl[l]y unrelated to any interest protected by the collective bargaining agreement").

2. The Subject Matter Of The Union's Grievances Comes Within The "Zone Of Interests" Protected By The CBA

Rather than explaining why the Union's grievances do not satisfy the "zone of interests" test, Maj. Op. at 7, the Majority asks whether (1) the Union's grievances "genuinely" or "sufficiently implicate[]" any provision of the CBA, *id.* at 9, 14–15; (2) the grievances "raise[] a legitimate question of the CBA's interpretation," *id.* at 9; (3) the Recognition, Observation, and Privileges Provisions are "susceptible of [the] interpretation" the Union advances, *id.* at 12; and/or (4) the right of store access the Union seeks to enforce can be "plausibly derived" from these

provisions, *id.* In so doing, I believe the Majority strays from permissibly determining whether the Union's grievances "come within the scope" of the arbitration provision, *E.M. Diagnostic*, 812 F.2d at 95, to impermissibly determining "whether there is particular language in the [CBA] which will support the [Union's] claim." *Am. Mfg. Co.*, 363 U.S. at 568.

I express no view on the ultimate merits of the Union's grievances or its interpretations of the Observation, Recognition, or Privileges Provisions. I conclude, however, that (1) at least one of these provisions—the Recognition Provision—sufficiently demonstrates that the Union's asserted right of store access falls within the "zone of interests" that have received protection in the CBA; and (2) the Union's interpretation of the Recognition Provision is not nearly as implausible as the Majority suggests.

The CBA's Recognition Provision provides, in pertinent part (and with emphasis added):

> [Rite Aid] recognizes the Union as the *sole and exclusive bargaining agent* for the purpose of bargaining in the Bargaining Unit in respect to rates of pay, wages, hours of employment, and other conditions pertaining to employment *for . . . [a]ll full time and part time selling and non-selling associates employed at [Rite Aid] stores [within the counties identified in the CBA].*

This provision does not distinguish between existing and newly acquired stores; rather, it applies to "all" employees "employed at [Rite Aid] stores" within the counties covered by the CBA. Accordingly, under a literal reading, it requires Rite Aid to recognize the

Union as the "sole and exclusive bargaining agent" for all employees in Rite Aid stores, whether existing at the time the CBA was entered or acquired thereafter.

In 1974, the National Labor Relations Board ("NLRB") ruled that provisions of this character—also referred to as "additional stores" provisions—are unlawful because, when read literally, they purport to make the Union automatically the "exclusive bargaining agent" for employees in newly acquired or opened stores, without a Board-directed election or other demonstration of majority support. *See Houston Div. of the Kroger Co. (Kroger I)*, 208 N.L.R.B. 928, 929 (1974) ("We will not permit parties to include employees in a newly created presumptively appropriate unit into a larger unit without a proper assessment of employee sentiment as to representation."). A year after *Kroger I*, the Court of Appeals for the D.C. Circuit disagreed with the Board's conclusion regarding the invalidity of such provisions, and concluded that they must "be interpreted to mean that the employer waives its right to a Board ordered election." *Retail Clerks Int'l Ass'n Local No. 455 v. NLRB*, 510 F.2d 802, 806 (D.C. Cir. 1975); *see also NLRB v. Retail Clerks Local 588*, 587 F.2d 984, 986 n.2 (9th Cir. 1978) (agreeing that such provisions "waive the employer's absolute right to demand an election; instead the employer must accept alternative methods of proving majority support"). The Court noted, however, that "[t]he specific non-election recognition procedures which the clauses permit is a matter for the parties to consider in the first instance," and "express[ed] no opinion whether authorization cards [*i.e.*, cards that designate the union as the employee's bargaining agent] or other procedures may be utilized or objected to consistent with the[se] clauses." *Retail*

Clerks, 510 F.2d at 806. On remand, the NLRB adopted the D.C. Circuit Court's interpretation, agreeing that such provisions are valid to the extent they operate as "contractual commitments by the Employer to forgo its right to resort to the use of the Board's election process in determining the Unions' representation status in . . . new stores." *Houston Div. of the Kroger Co. (Kroger II)*, 219 N.L.R.B. 388, 389 (1975).

The Union argues that, in light of *Kroger I* and *Kroger II*, the Recognition Provision is ambiguous because it cannot mean what it literally says—*i.e.*, it purports to make the Union automatically the "sole and exclusive bargaining agent" for employees in newly acquired stores, despite the requirement of some showing of majority support as a prerequisite for such status. Moreover, the argument continues, although the Recognition Provision operates as a waiver of Rite Aid's right to demand a Board-ordered election, neither the Recognition Provision nor any other provision of the CBA sets out the "specific non-election recognition procedures" by which the Union may show majority support in newly acquired stores, *Retail Clerks*, 510 F.2d at 806, including whether Union representatives may enter newly acquired stores for the purpose of obtaining such majority support.

Accordingly, the Union seeks the opportunity through arbitration to demonstrate, based on the parties' past practices and/or custom, that they understood the Recognition Provision to grant the Union the right to enter newly acquired stores for the

purpose of soliciting membership.[13] See, e.g., *Consol. Rail Corp. v. Ry. Labor Executives' Ass'n*, 491 U.S. 299, 311 (1989) (explaining that "collective-bargaining agreements may include implied, as well as express, terms," and that "it is well established that the parties' practice, usage and custom [are] of significance in interpreting their agreement") (internal quotation marks omitted); *see also Warrior & Gulf*, 363 U.S. at 581–82 ("The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law—the practices of the industry and the shop—is equally a part of the collective bargaining agreement although not expressed in it.").

Is the Union's position far-fetched? Hardly. For though the Majoritydismisses thatposition as "unpersuasive," Maj. Op. at 12, the Union has submitted an arbitration decision reaching in a similar case the very result it asks for, *see* 2005 AAA LEXIS

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[13] The Majority dismisses the relevance of the *Kroger* decisions, reasoning that any "ambiguity in *Kroger* . . . does not translate to ambiguity in the instant CBA." Maj. Op. at 10. I believe my colleagues misperceive the Union's argument. It is not that *Kroger II* is ambiguous; but that it *results* in ambiguity in the CBA. Because Rite Aid has waived its right to require the Union to show majority support through an NLRB election, it must accept some alternative means by which the Union can make that showing. It is entirely possible that the parties resolved this issue by adopting a practice—even if it not explicitly memorialized in the CBA—of allowing Union representatives to enter Rite Aid stores for such purposes; *i.e.*, entering newly acquired stores to distribute authorization cards.

383 (2005) (Shaw, Arb.),[14] as well as a decision by the federal District Court for the District of Oregon enforcing a similar arbitration decision. *See Albertson's Inc. v. Local 555*, No. 97-977-JO, slip op. (D. Or. Mar. 16, 1998).[15]Both of these arbitrations concerned a grievance challenging an employer's refusal, purportedly pursuant to a non-solicitation policy, to permit union representatives to enter new stores to solicit membership. *See* 2005 AAA LEXIS 383, at *1; *Albertson's*, No. 97 977-JO, slip op. at 14–15. And in both the arbitrator—relying on the ambiguity in the parties' recognition provisions resulting from the *Kroger* decisions—determined that the parties' past practices demonstrated that they understood the bargaining agreement to grant the union the right to enter new stores to solicit membership. *See* 2005 AAA LEXIS 383, at *45–46; *Albertson's*, No. 97-977-JO, slip op. at 14. These decisions serve only to underscore that

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[14] The docket number and the parties' names were redacted from the arbitrator's written opinion. Although not themselves in the record on appeal, in her opinion the arbitrator cited five additional arbitration decisions that apparently reached the same result. *Id.* at *23–24.

[15] The Majority seeks to distinguish this decision on the ground that the collective bargaining agreement at issue in *Albertson's*, unlike the Rite Aid CBA, included "a provision specifically providing for the applicability of the CBA to new stores." Maj. Op. at 11. However, the NLRB has ruled that the effect of a recognition provision worded similarly to the Rite Aid Recognition Provision is the same—it "purport[s] to add after-acquired stores to the existing [bargaining] units." *Kroger I*, 208 N.L.R.B. at 929 (considering recognition provision that provided that "[t]he Union shall be the sole and exclusive bargaining agent for all employees employed bythe [employer] in stores operating in the state of Texas"). Hence, the differently worded recognition provision in *Albertson's* is not a basis for distinguishing that decision.

the Union's asserted right of store access is, at the least, "not so plainly unreasonable that [it] must be regarded as nonarbitrable because it can be seen in advance that no award to the Union could receive judicial sanction."[16] John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 555 (1964) (*citing Warrior & Gulf*, 363 U.S. at 582–83).

Moreover, the Union's grievances present at least as strong a case for arbitrability as the grievance in *E.M. Diagnostic*, where we relied on "implicit" limits on the company's explicit right to subcontract to conclude that the grievance was arbitrable. 812 F.2d at 96. Just as the company's subcontracting all work in the bargaining unit would have been "inconsistent with the [collective bargaining] agreement's recognition of the Union as the bargaining agent for the Company's employees," *id.*, Rite Aid's refusal to allow Union representatives to enter newly acquired stores to solicit Union membership and distribute authorization cards—the obvious alternative to initiating an NLRB-directed election (the right to which Rite Aid has waived by virtue of *Kroger II*)—is inconsistent with the Recognition Provision. Indeed, it would be anomalous if Rite Aid could avoid the apparent intent of the Recognition Provision—*i.e.*, recognizing the Union as the bargaining agent for

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[16] The Majority finds it "rather curious" that the Union has "urg[ed] us to consider favorable . . . merits decisions as evidence of the dispute's arbitrability," given that the "merits and arbitrability questions are distinct." Maj. Op. at 10 n.5. In light of the District Court's and the Majority's conclusion that the merits and the question of arbitrability are "inextricably intertwined" in this case, I see nothing curious about the Union's submission of these decisions.

employees in newly acquired stores without requiring the parties to go through an NLRB-directed election—by preventing the Union from showing majority support through this alternative procedure.

In sum, I believe the Recognition Provision sufficiently demonstrates that the subject matter of the Union's grievances falls within the zone of interests that have received protection in the CBA,[17] and thus falls within the scope of the CBA's broad arbitration clause. In seeking to compel arbitration,

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[17] Further supporting this conclusion is the fact that the CBA expressly provides that Union representatives may enter Rite Aid stores for at least one purpose: the Observation Provision authorizes Union representatives to enter Rite Aid stores "to satisfy themselves that [the CBA] is being observed." Regardless of the merits of the Union's position that this provision should be interpreted as authorizing it to enter newly acquired stores to solicit membership, the Observation Clause confirms that the *subject matter* of the Union's grievances—*i.e.*, the circumstances in which Union representatives may enter Rite Aid stores—falls within the "zone of interests" that have received protection in the CBA.

The Majority, like the District Court, concludes that the Observation Provision is irrelevant to the Union's grievances, as "[t]he CBA cannot apply to the newly-acquired stores or to their employees because the Union does not presently represent those stores' employees." Maj. Op. at 13. Of course, the Majority's conclusion only makes sense in light of *Kroger II*; when read literally, the Recognition Provision purports to do exactly that (*i.e.*, make the Union automatically the bargaining agent for employees in newly acquired stores). Thus, although the Majority concludes that the Recognition Provision is *not* ambiguous (in rejecting the Union's interpretation of that provision), it nonetheless relies on the *ambiguity* in the Recognition Provision that results from *Kroger II* in rejecting the Union's interpretation of the Observation Provision.

the Union is not attempting to enforce a right that is "wholly outside the scope of the CBA," Maj. Op. at 16, such as forcing Rite Aid to distribute Christmas Turkeys to its employees, *Boeing Co.*, 349 F.2d at 413. Rather, the Union seeks to enforce, by arbitrating the meaning of an ambiguous provision of the CBA, an asserted right that implicates a fundamental aspect of the parties' ongoing relationship under thatagreement. With scant evidence of the parties' past practices, understandings, prior agreements, or bargaining history, we are ill-equipped to decide whose interpretation of the Recognition Provision is correct. Rather, that function is properly fulfilled by an arbitrator, as the parties have agreed.[18] *Cf. United*

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[18] Because the Recognition Provision sufficiently demonstrates that the Union's grievances come within the "scope" of the CBA's arbitration provision, I need not address the Union's argument regarding the Privileges Provision. I note, however, that our decision in *United Steelworkers of America v. Rohm and Haas Co.*, 522 F.3d 324 (3d Cir. 2008)—on which Rite Aid relies almost exclusively in its brief—does not, as the Majority contends, broadly authorize courts to interpret substantive provisions of a collective bargaining agreement to determine whether they are "sufficiently implicated by a grievance that one party seeks to arbitrate." Maj. Op. at 14–15.

The collective bargaining agreement in *Rohm and Haas* contained an arbitration provision that, unlike the Rite Aid CBA's arbitration provision, applied only to specific subjects—*i.e.*, "[s]uch questions arising under [the] Agreement as involve wages . . . , individual base rates, hours of employment and working conditions." 522 F.3d at 328 (first alteration in original). After their claims for disability benefits under the parties' ERISA plan (which lacked an arbitration provision) were denied by the plan administrator, union employees sought to arbitrate those claims under the parties' collective bargaining agreement. In light of the arbitration provision's express subject matter limitations, we

Steel Workers Int'l Union v. TriMas Corp., 531 F.3d 531, 536 (7th Cir. 2008) ("If the parties have in fact agreed to arbitrate their dispute, then they have bargained for the *arbitrator's* interpretation of their contract—not ours. . . . If we were to weigh in on the merits of their case, we would be denying them the

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reasoned that, "[a]lthough . . . the . . . arbitration clause [was] broad, the underlying basis for the [union's] grievance . . . must still arise from some specific article" of the collective bargaining agreement. *Id.* at332. Accordingly, we considered substantive provisions of the collective bargaining agreement to determine whether, as the union argued, "disability benefits are considered 'working conditions'" [under the collective bargaining agreement]," and thus "within the range of arbitrable subject matter." *Id.* We concluded the answer was clearly no.

The Majority suggests that I dismiss *Rohm and Haas* (on which I was on the panel that decided it) without explaining why "we should not be bound by this very recent binding precedent." Maj. Op. at 15 n.7. I do not question the binding nature of *Rohm and Haas*, but conclude that it is simply not on point. In *Rohm and Haas*, it was obvious that the subject matter of the union's grievances—entitlement to disability benefits under a completely separate ERISA plan—fell wholly outside the scope of the collective bargaining agreement. ERISA benefits on their face simply are not "working conditions." To be sure of this, we considered the union's arguments that certain provisions of the bargaining agreement could be construed as referring to or incorporating the disability benefits provided for under the ERISA plan. In so doing, however, we did not broadly hold that "the merits maybe considered when necessary to determine arbitrability." *Id.* Indeed, we had no reason to consider the merits of whether the employees were entitled to disability benefits under the ERISA plan, and did not, as the Majority does, rely on *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190 (1991), to justify our analysis. Accordingly, I cannot agree that *Rohm and Haas* is the watershed decision my colleagues apparently believe it is.

benefit of that bargain.") (emphasis in original) (internal citation omitted).

3. The Merits And The Issue Of Arbitrability Are Not "Inextricably Intertwined"

The Majority, like the District Court, also relies on *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190 (1991), to justify its consideration of the merits of the Union's grievances. The Majority concludes that (1) *Litton* authorizes courts to consider the merits of grievances whenever "the merits and arbitrability questions are inextricably intertwined," Maj. Op. at 17; and (2) these questions are necessarily "intertwined" where a collective bargaining agreement "limit[s] the scope of arbitration to matters regarding the agreement or its construction," *id.* at 19. *Litton* does not support either of these conclusions.

In *Litton*, the Supreme Court considered the arbitrability of grievances filed on behalf of employees who were laid off almost one year after the parties' collective bargaining agreement had expired. To determine whether the grievances were arbitrable, the Court first sought to interpret its decision in *Nolde Brothers, Inc. v. Local No. 358, Bakery & Confectionary Workers Union*, 430 U.S. 243 (1977), which announced a presumption in favor of post-expiration arbitration unless "negated expressly or by clear implication," and held that, in determining whether a post-expiration grievance is arbitrable, courts should determine whether the grievance "arises under" the expired agreement. *Id.* at 253, 255. The *Litton* Court explained that, to "arise under" an expired collective bargaining agreement, the grievance must "involve[] facts and

occurrences that arose before expiration, where an action taken after expiration infringes a right that accrued or vested under the agreement, or . . . , under normal principles of contract interpretation, [involves] [a] disputed contractual right [that] survives expiration of the remainder of the agreement." *Litton*, 501 U.S. at 206. Applying this rule, the Court determined that the seniority rights the employees sought to enforce did not "arise" out of the expired collective bargaining agreement because "factors such as aptitude and ability"—on which application of the seniority provision was dependent—"do not remain constant, but change over time." *Id.* at 210 ("We cannot infer an intent on the part of the contracting parties to freeze any particular order of layoff or vest any contractual right as of the Agreement's expiration.").

The *Litton* Court acknowledged that, in determining that seniority rights did not "arise" under the expired agreement, it had (1) interpreted a substantive provision of the collective bargaining agreement (the seniority provision), and (2) necessarily reached the merits of the grievances. *See id.* at 208–09. The Court explained, however, that the presumption of arbitrability should not apply with its usual force in the context of post-expiration grievances:

> We acknowledge that where an effective bargaining agreement exists between the parties, and the agreement contains a broad arbitration clause, "there is a presumption of arbitrability in the sense that '[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the

> asserted dispute.'" *But we refuse to apply that presumption wholesale in the context of an expired bargaining agreement, for to do so would make limitless the contractual obligation to arbitrate.* Although "[d]oubts should be resolved in favor of coverage," we must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement.

Id. at 209 (*quoting AT&T Techs.*, 475 U.S. at 650) (emphasis added).

The Majority interprets *Litton* as follows: "Because the Agreement limited the scope of arbitration to matters regarding the agreement or its construction,[10] the Supreme Court in *Litton* found it necessary to interpret the agreement in order to properly determine the question of arbitrability." Maj. Op. at 18–19. I believe this is incorrect. The *Litton* Court did not justify its consideration of the merits based on the language of the parties' arbitration provision, but rather on its concern that applying the presumption of arbitrability "*in the context of an expired bargaining agreement* . . . would make limitless the contractual obligation to arbitrate." *Litton*, 501 U.S. at 209 (emphasis added). Indeed, in refusing to apply the presumption of arbitrability "wholesale" in this

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[10] The arbitration provision in the expired collective bargaining agreement at issue in *Litton* provided: "Differences that may arise between the parties hereto regarding this Agreement and any alleged violations of the Agreement, [and] the construction to be placed on any clause or clauses of the Agreement[,] shall be determined by arbitration . . . ." *Id.* at 194.

context, *id.*, the Court seems to have assumed that applying the presumption with its normal force would have *required* arbitration (in light of the collective bargaining agreement's broad arbitration provision).

To support its reading of *Litton*, the Majority relies on two decisions from our sister circuits applying *Litton* outside the context of post-expiration grievances. However, these cases involved a similarly narrow issue: whether grievances brought on behalf of individuals who had either been elevated to supervisory positions, or had retired, were covered under bargaining agreements that applied only to "employees." *See Int'l Bhd. of Elec. Workers, Local 1 v. GKN Aerospace N.A., Inc.*, 431 F.3d 624, 629 (8th Cir. 2005) (where arbitration provision applied only to grievances submitted by "employees," supervisor's grievance was not arbitrable because "a plain reading" of the collective bargaining agreement did "not permit the possible inference that [the supervisor] ha[d] a right to return to the bargaining unit"); *Indep. Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233, 235–36 (7th Cir. 1993) (district court erred in compelling arbitration of retired employee's grievance without deciding whether "the collective bargaining agreement covers retired employees," because, in so doing, the court had "order[ed] the dispute to arbitration without first determining that it was arbitrable"); *see also United Steelworkers of Am., Local No. 1617 v. Gen. Fireproofing Co.*, 464 F.2d 726, 729 (6th Cir. 1972) (holding, pre-*Litton*, that supervisor's grievance was not arbitrable because the "plain meaning" of the collective bargaining agreement's arbitration provision was "that the Company has agreed to process any and all disputes involving its 'employees' through the grievance procedures

(including arbitration), but that disputes concerning supervisory personnel are not included").[20]

In this context, these courts reasoned that the merits of the grievances and the question of arbitrability were "intertwined," *GKN Aerospace*, 431 F.3d at 627, or "collaps[ed] into the same inquiry," *Hyster*, 2 F.3d at 235, because, in determining that the grieving employee was not covered by the collective bargaining agreement, the court was necessarily determining that the employee was not entitled to relief under that agreement. For example, in *Hyster* the Seventh Circuit Court reasoned that three questions—"whether the Union has standing to file a grievance on behalf of retired employees, whether the grievance is arbitrable, and whether the grievance has merit—all collapse[d] into the same inquiry: whether the collective bargaining agreement covers retired employees." 2 F.3d at 235.

The *GKN Aerospace* and *Hyster* Courts were thus presented with the threshold issue of whether the individuals attempting to arbitrate a grievance under the collective bargaining agreement's grievance

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[20] Although cited by the Majority, the First Circuit Court's decision in *Peerless Pressed Metal Corporation v. International Union of Electrical, Radio and Machine Workers*, 451 F.2d 1901 (1st Cir. 1971) issued two decades before the Supreme Court's decision in *Litton* does not support the Majority's analysis. Indeed, in concluding that grievances lodged by a supervisor were arbitrable—even though the argument that supervisors were covered under the collective bargaining agreement was "weak" (but not "impossible"), *id.* at 21—*Peerless* cautioned that courts may not "inquire into the merits on the theory that they are enforcing a clause limiting arbitration to disputes requiring an interpretation of the agreement." *Id.* at 20.

procedure were authorized to do so—or, using the language of *E.M. Diagnostic*, whether the interests these individuals sought to enforce came within the "zone of interests" protected under the agreement. This issue went directly to the jurisdiction of the arbitrator to hear the grievance in the first place. *Cf. Terre Haute Newspaper Guild, Local No. 46 v. Thomson Newspapers, Inc.*, 68 F. Supp. 2d 1028, 1033, 1037 (S.D. Ind. 1999) (discussing *Litton* and *Hyster*, and reasoning that "it is the Court's responsibility to determine whether the . . . employees may be covered [under the collective bargaining agreement] before it can send the question to the arbitrator"). Stated another way, these Courts believed they were required to determine, as a threshold matter, whether the employees were authorized to bring grievances under the respective collective bargaining agreement regardless of whether, had they been so authorized, those grievances would have been meritorious.

In our case, the merits of the Union's grievances and the issue of arbitrability are not "intertwined" in a similar sense: it is undisputed that the CBA remains in force and that the Union is authorized to bring grievances under it. At bottom, the Majority's conclusion that the merits and the issue of arbitrability are "inextricably intertwined" reduces to the conclusion that the Union's grievances do not *actually* "involve the interpretation" of the CBA *because* they are not meritorious. As I have explained, the *Steelworkers* principles prohibit this line of inquiry, and I cannot discern from *Litton* any intention

on the part of the Supreme Court to jettison those principles in all contexts.[21]

B. The Union's Dispute Is Not Expressly Excluded From Arbitration, And There Is No "Forceful Evidence" Of An Intention To The Contrary

Because the Union's grievances come within the scope of the CBA's arbitration provision, I conclude that we are required to compel arbitration. It is undisputed that the CBA's arbitration provision is broad, and that the presumption of arbitrability applies. Accordingly, the Union's dispute is arbitrable unless (1) the CBA contains an "express provision excluding it" from arbitration, or (2) Rite Aid (the party opposing arbitration) produces "the most forceful evidence" to this effect from the bargaining history. *AT&T Techs.*, 475 U.S. at 650 (*quoting Warrior & Gulf*, 363 U.S. at 584–85).

Neither is true here: (1) the CBA contains no arbitration exclusion for disputes over the circumstances in which Union representatives may

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[21] The Majority's reliance on *Litton* is ironic, given the lengths our Court has gone to avoid reaching the merits even in the context of grievances arising under expired collective bargaining agreements. *See Linden's Inc. v. Local Union No. 6 of the Bakery Workers' Int'l Union of Am.*, 28 F.3d 347, 354 (3d Cir. 1993) (declining to answer whether *Litton* "impliedly overruled the portion of *Nolde* holding that a court answering the arbitrability question is not to look to the merits of the underlying claim," and instead holding that the duty to arbitrate arose as a term of an implied-in-fact collective bargaining agreement after the prior agreement had lapsed).

enter Rite Aid stores,[22] and (2) Rite Aid has submitted no "forceful evidence" from the parties' bargaining history suggesting an intention to exclude such disputes from arbitration.[23] Thus, we must order the

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[22] The CBA expressly excludes only one topic from the grievance procedure: an alleged breach of the no strike clause.

[23] The Majority appears to suggest that such "forceful evidence" exists because the CBA includes other provisions addressing new stores – *i.e.*, a provision recognizing Rite Aid's right to "open new establishments of any kind," and requiring Rite Aid to "notify the Union of any new store openings or acquisitions within" the counties covered by the CBA. Because these provisions confirm that the parties bargained with respect to Rite Aid's right to open new stores, the Majority concludes that "[i]f the parties had intended a right of access to be encompassed by the CBA's arbitration clause, it surely would have appeared in the CBA." Maj. Op. at 17 n.8.

This observation might be relevant to the merits of the Union's underlying grievances, but it reveals nothing about the parties' intent to exclude from arbitration disputes over the circumstances in which Union representatives may enter new Rite Aid stores. Indeed, we rejected a similar argument in *E.M. Diagnostic*, where the employer argued that the union's subcontracting grievance was not arbitrable based on evidence from the bargaining history that (1) although "the Union sought to negotiate a specific limitation on the Company's right to subcontract work," the executed bargaining agreement contained no such provision, and (2) a union representative had acknowledged the employer's unfettered right to subcontract during negotiations. 812 F.2d at 97 ("However relevant [those facts] might be to the merits of the Company's case on the subcontracting issue, it does not enlighten us on whether the parties agreed to limit the arbitration clause of the agreement to less than its apparent scope."); *accord Lukens Steel Co. v. United Steelworkers of Am.*, 989 F.2d 668, 674 (3d Cir. 1993) (grievance regarding the timing of recall of employees following a strike was arbitrable, despite evidence from the parties' bargaining history

parties to arbitrate the grievances even if the Union's interpretations of the Recognition, Observation, and/or Privileges Provisions are "frivolous," as engaging in a substantive interpretation of these provisions would involve an impermissible review of the merits.[24]

* * * * *

"Decisions on the merits, whether easy or difficult, must be left to the arbitrator." *E.M. Diagnostic*, 812 F.2d at 97. The Majority essentially concludes that the merits question of whether the Union has a right of store access to solicit membership is so "easy" to answer that arbitration is not called for. Although the Majority reaches this conclusion under the guise of enforcing the parties' agreement to arbitrate only those disputes that "involve the interpretation" of the CBA, it conflates that question with whether the Union's interpretation of the CBA is correct. In my view, such analysis veers impermissibly into the merits of the underlying grievances, and fails to heed

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that the timing issue was "left outside the contract [subject] to [the employer's] unilateral determination," because "even if the parties agreed that [the employer] had the right to set the timing of the recall, it would not necessarily follow that disputes over the timing of the recall were not arbitrable").

[24] The Majority suggests that the CBA's arbitration provision *itself* constitutes "forceful evidence" that the parties "intended to exclude from arbitration claims which arise wholly outside the scope of the CBA." Maj. Op. at 16. I do not believe such a conclusion follows under the *Steelworkers* principles—*i.e.*, those principles do not contemplate that a court may substitute its own interpretations of substantive provisions of a bargaining agreement for "forceful evidence" from the bargaining history of an intention to exclude a dispute from arbitration.

the Supreme Court's warning that courts not "become entangled in the construction of the substantive provisions of a labor agreement, even through the back door of interpreting the arbitration clause." *Warrior & Gulf*, 363 U.S. at 585.

I fear the Majority's holding will significantly undercut the force of the presumption of arbitrability in cases involving similar arbitration provisions. In such cases, courts in our Circuit will presumably conclude that they may examine the merits of every grievance and, upon determining that the arbitration proponent's interpretation of the bargaining agreement is not sufficiently "plausible," refuse to compel arbitration. I do not believe the *Steelworkers* Courts envisioned such a screening role for courts, nor do I believe the *Litton* Court intended to announce an exception to the presumption of arbitrability that would effectively swallow the presumption itself.

For these reasons, I respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 09-1989

[Filed February 16, 2010]

RITE AID OF PENNSYLVANIA, INC.	)
	)
vs.	)
	)
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776,	)
Appellant	)
	)

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Civil No. 08-33)
District Court Judge:
Honorable Christopher C. Conner

Argued November 10, 2009

Before: AMBRO, GARTH,
and ROTH, Circuit Judges,

JUDGMENT

This cause came to be heard on the record from consolidated appeals of the District Court's judgment of March 31, 2009, and was argued on November 10, 2009. On consideration whereof, it is now here

ORDERED and ADJUDGED that the judgment of the District Court be, and the same is, hereby AFFIRMED. Costs to be taxed against the Appellant.

ATTEST:

Marcia M. Waldron,
Clerk

Dated: February 16, 2010

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 1:08-CV-0033

[Filed March 31, 2009]

RITE AID OF PENNSYLVANIA, INC.,	)
	)
Plaintiff	)
	)
v.	)
	)
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776,	)
	)
Defendant	)
	)

(Judge Conner)

MEMORANDUM

Plaintiff Rite Aid of Pennsylvania, Inc. (hereinafter "Rite Aid" or "the company") initiated this declaratory

judgment action[1] challenging the arbitrability of grievances filed under three collective bargaining agreements ("CBAs") by defendant United Food and Commercial Workers Union, Local 1776 (hereinafter "Local 1776" or "the union"). In late September 2007, representatives of Local 1776 entered six non-union stores newly acquired by Rite Aid for the purpose of soliciting employee interest in unionization. Rite Aid immediately restricted the representatives' access to the stores. Local 1776 filed grievances with Rite Aid, alleging that the company's action violated the CBAs. Rite Aid commenced the instant matter to determine the arbitrability of these grievances. The parties have filed cross-motions for summary judgment (Docs. 10, 13). For the reasons that follow, Rite Aid's motion for summary judgment (Doc. 13) will be granted, and the union's motion (Doc. 10) will be denied.

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[1] The court's subject matter jurisdiction over this action derives from § 301(a) of the Labor Management Relations Act, which provides, in pertinent part, as follows:

> Suits for violations of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a), see also Mack Trucks, Inc. v. Int'l Union, United Auto, Aerospace & Agric. Implement Workers, 856 F.2d 579, 583-90 (3d Cir. 1988) (holding that § 301(a) confers jurisdiction over issues regarding the existence and construction of collective bargaining agreements upon district courts).

I. Statement of Facts[2]

Rite Aid operates a nationwide chain of over 5,100 drugstores in twenty-eight states and the District of Columbia. (Doc. 16 ¶ 1; Doc. 20 ¶ 1.) The three CBAs presently at issue cover unionized Rite Aid stores in twenty-four Pennsylvania counties. (Doc. 16, Ex. A § 2.1.2; Doc. 16, Ex. B at § 2.1.2; Doc. 16, Ex. C at § 2.1.2.)[3] The current versions of the CBAs were ratified in 2004 and were in effect when Rite Aid acquired a drugstore chain formerly operated by Brooks Eckerd on June 4, 2007. (Doc. 15 ¶ 6; Doc. 16 ¶ 20; Doc. 18 ¶ 6; Doc. 20 ¶ 20.) Several of the newly acquired stores are located in the geographic territory covered by the Rite Aid-Local 1776 CBAs; however, Local 1776 does not represent the employees in any of these stores. (Doc. 15 ¶ 7; Doc. 16 ¶ 21; Doc. 18 ¶ 7; Doc. 20 ¶ 21.)

During late September and early October 2007, representatives of Local 1776 attempted to enter six of the stores (hereinafter "the Brooks-Eckert stores") for the purpose of soliciting employee interest in unionization. (Doc. 15 ¶ 9; Doc. 16 ¶¶ 25 26, 30-31, 35-36, 40-41, 45-46, 50-51; Doc. 18 ¶ 9, Doc 20 ¶¶ 25-26, 30 31, 35-36, 40-41, 45-46, 50 51.) Rite Aid barred the union representatives from entering the stores. (Doc. 15 ¶ 10; Doc. 16, Ex. F; Doc. 18, ¶ 10.) On

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[2] In light the applicable standard of review, the court will present the facts in the light most favorable to the non-moving party with respect to each motion. See infra Part II.

[3] For ease of reference the court will cite all three agreements collectively as "Doc. 16, CBAs." Hence, a citation to "Doc. 16, CBAs § 9.6" refers to Section 9.6 in each of the three agreements.

November 7, 2007, the union filed identical grievances under each of the three CBAs alleging that the denial of store access violated certain provisions thereof. (Doc. 16, Ex. F.)

The grievances asserted that, during the decades preceding the instant dispute,[4] Rite Aid had observed a practice of granting union representatives unobstructed access to newly constructed and newly acquired stores to solicit employee interest in unionization. (Doc. 15-3 at 2; Doc. 20, Ex. 1 ¶ 4.) The union asserted that store access was protected by Articles 2, 5.1, and 15.3 of the CBAs. Article 2 of the CBAs (hereinafter "the recognition clause") provides as follows:

> [Rite Aid] recognizes the Union as the sole and exclusive bargaining agent for the purpose of bargaining in the Bargaining Unit in respect to rates of pay, wages, hours of employment, and other conditions pertaining to employment for . . . [a]ll full time and part time selling and non-selling associates employed at [Rite Aid] stores [within the counties identified in the CBAs].

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[4] Though the CBAs became effective in 2004, the parties' past collective bargaining agreements apparently included clauses substantially similar to those at issue herein. (Doc. 20, Ex. 1 ¶ 3-4.)

(Doc. 16, Ex. A §§ 2.1-2.1.2.)[5] Article 5.1 (hereinafter "the observation clause") grants Local 1776 the right to enter Rite Aid stores to ensure that the company has complied with the terms of the CBAs:

> It is agreed that the Union duties and activities will not be carried on during hours of work. This shall not prevent the Union officials from entering [Rite Aid] establishments to satisfy themselves that this Agreement is being observed, provided that same shall not interfere with the normal operations or business of the store.

(Doc. 16, CBAs § 5.1.) Finally, Article 15.3 (hereinafter "the privileges clause") governs Rite Aid's obligations with respect to certain benefits extended by the company:

> Only privileges which have been granted by [Rite Aid] since its acquisition of the establishments covered by this Agreement shall be continued. Privileges accorded by the previous owner, but not continued by [Rite Aid], shall not bind [Rite Aid].

(Id. § 15.3.) None of the CBAs specify the nature of the "privileges" that this clause protects. Rite Aid rejected

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[5] The court will quote all contractual language from the CBA covering Rite Aid's Northeast Division. (Doc. 16, Ex. A) The analogous clauses of the other two CBAs substantially mirror the language contain in the Northeast Division agreement. The only inconsistencies among the agreements appear in the numbering of clauses in Article 2 and in inconsequential variations in the language of Articles 2 and 5.1.

the union's store access grievances, citing its "No Solicitation" policy, under which "[s]olicitation for any cause or distribution of material is prohibited if one or more of the Rite Aid Associates engaged in the interaction is on working time." (Doc. 16, Ex. G.)

Local 1776 notified Rite Aid of its intent to arbitrate the store-access dispute pursuant to the arbitration provisions of the collective bargaining agreements. (Doc. 1 ¶ 61; Doc. 5 ¶ 61.) The contracts' arbitration clause requires the parties to refer all grievances to arbitration unless a dispute exceeds the scope of the CBAs:

> No grievance shall be filed by . . . the Union, nor need [Rite Aid] entertain any grievance *that does not involve the interpretation of any provision of this Agreement*.

(Doc. 16, CBAs § 11.4 (emphasis added); see also id. § 11.2 (requiring arbitration of disputes)).

Rite Aid commenced the instant action to determine the arbitrability of the union's grievances. The company contends that the pending grievances do not require interpretation of the clauses cited by Local 1776, thereby placing the dispute beyond the purview of the contracts' compulsory arbitration provision. Local 1776 responds that the dispute implicates the recognition, observation, and privileges clauses, and must therefore be arbitrated. The parties have fully briefed these issues, which are now ripe for disposition.

II. Standard of Review

Through summary judgment the court may dispose of those claims that do not present a "genuine issue as to any material fact," and for which a jury trial would be an empty and unnecessary formality. See FED. R. CIV. P. 56(c). It places the burden on the non-moving party to come forth with "affirmative evidence, beyond the allegations of the pleadings," in support of its right to relief. Pappas v. City of Lebanon, 331 F. Supp. 2d 311, 315 (M.D. Pa. 2004); FED. R. CIV. P. 56(e); see also Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986). This evidence must be adequate, as a matter of law, to sustain a judgment in favor of the non-moving party on the claims. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 250-57 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-89 (1986); see also FED. R. CIV. P. 56(c), (e). Only if this threshold is met may the cause of action proceed. Pappas, 331 F. Supp. 2d at 315.

The court is permitted to resolve cross-motions for summary judgment concurrently. Cf. Assicurazioni Generali, S.P.A. v. Pub. Serv. Mut. Ins. Co., 77 F.3d 731, 733 & n. 2 (3d Cir. 1996) (observing that district court may dispose of case through cross-motions for summary judgment); see also 10A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 2720 (3d ed. 1998). When doing so, the court is bound to view the evidence in the light most favorable to the non-moving party with respect to each motion. FED. R. CIV. P. 56; United States v. Hall, 730 F. Supp. 646, 648 (M.D. Pa. 1990).

III. Discussion

Rite Aid seeks a declaratory judgment that the store-access grievances fall beyond the reach of the CBAs' arbitration clause. Three Supreme Court cases, known collectively as the Steelworkers Trilogy, govern the arbitrability of disputes arising under collective bargaining agreements. See United Steelworkers v. Am Mfg. Co., 363 U.S. 564 (1960), United Steelworkers v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960); United Steelworkers v. Enter. Wheel & Car Co., 363 U.S. 593 (1960). Under the Trilogy, a party may not be compelled to arbitrate unless it has contractually agreed to do so. Warrior & Gulf, 363 U.S. at 582, Am. Mfg. Co., 363 U.S. at 570-71. When a collective bargaining agreement contains an arbitration provision, the merits of a dispute covered by the clause must be submitted to an arbitrator. Am. Mfg. Co., 363 U.S. at 571. Challenges to the arbitrability of a dispute, however, remain matters for judicial determination. AT&T Techs. v. Commc'ns Worker, 475 U.S. 642, 649 (1986); Trap Rock Indus. v. Int'l Union of Operating Eng'rs, 982 F.2d 884, 888 (3d Cir. 1992). When reviewing arbitrability, the court should avoid ruling on the merits of the underlying claim. AT&T Techs., 475 U.S. at 649-50; Trap Rock Indus., 982 F.2d at 888. The sole judicial function is to determine whether "the party seeking arbitration is making a claim which on its face is governed by the contract." United Steelworkers v. Rohm & Haas Co., 522 F.3d 324, 331 (3d Cir. 2008) (quoting Am. Mfg. Co., 363 U.S. at 567-68). The court should grant a motion to compel arbitration "unless it may be said with *positive assurance* that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." AT&T

Techs., 475 U.S. at 650 (quoting Warrior & Gulf, 363 U.S. at 582-83.); Graphic Comme'ns Int'l Union v. N. Am. Directory Corp., 98 F.3d 97, 101 (3d Cir. 1996). However, the positive assurance standard does not require that remote misgivings be resolved in favor of arbitration, and "a compelling case for nonarbitrability should not be trumped by a flicker of interpretative doubt." Comm'n Workers v. Am. Tel. & Tel. Co., 932 F.2d 199, 216 (3d Cir. 1991) (quoting PaineWebber, Inc. v. Hartmann, 921 F.2d 507, 812 (3d Cir. 1990)).[6]

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[6] A presumption of arbitrability applies to all contracts that contain a broadly fashioned arbitration clause. AT&T Techs., 475 U.S. at 650; Trap Rock Indus., 982 F.2d at 888 n.5. Broad clauses feature inclusive language, such as provisions requiring "any differences arising with respect to the interpretation" of the contract be submitted to arbitration. AT&T Techs., 475 U.S. at 650; see also, e.g., United Steel Workers Int'l Union v. E.I. DuPont De Nemours & Co., 549 F. Supp. 2d 585, 590 (D. Del. 2008). Such clauses require all disagreements involving the CBA to be submitted to an arbitrator unless either the contract expressly exempts the dispute or the party seeking to avoid arbitration produces other "forceful evidence of a purpose to exclude the claim." AT&T Techs., 475 U.S. at 650 (quoting Warrior & Gulf, 363 U.S. at 484-85); Rohm & Haas Co., 522 F.3d at 331. In contrast, narrow arbitration clauses—such as those that limit arbitration to a few discrete types of disputes—receive no presumption of arbitrability. See Int'l Bhd. of Elec. Workers v. Verizon N.J., Inc., 458 F.3d 305, 311 (3d Cir. 2006).

The arbitration provision at issue, which mandates arbitration unless a dispute "does not involve the interpretation of any provision" of the agreements, is broad in scope. (Doc. 16, CBAs § 11.4.) See, e.g., E.M. Diagnostic Sys., Inc. v. Local 169, Int'l Bhd. of Teamsters, 812 F.2d 91, 95 (3d Cir. 1987) (concluding that an arbitration clause covering "any dispute arising out of a claimed violation of this Agreement" was broad); Butler Armco Indep. Union v. Armco, Inc., 701 F.2d 253, 256-57 (3d Cir. 1983) (same with respect to a clause that granted the arbitrator "authority to

The United States Court of Appeals for the Third Circuit has identified three inquiries that guide a court's application of these principles. First, the court must evaluate whether the grievance falls within the ambit of the arbitration clause. Rohm & Haas, 522 F.3d at 331; E.M. Diagnostic Sys., Inc. v. Local 169, Int'l Bhd. of Teamsters, 812 F.2d 91, 95 (3d Cir. 1987). The court may not compel arbitration of a matter beyond the reach of the clause. If the dispute implicates the arbitration clause, however, the court must perform a second inquiry to determine whether any provision of the contract expressly exempts the dispute from arbitration. Rohm & Haas, 522 F.3d at 331; E.M. Diagnostic Sys., 812 F.2d at 85. If there is no express exemption, the third inquiry asks whether other "forceful evidence" indicates that the parties nonetheless intended to exclude the dispute from arbitration. Rohm & Haas, 522 F.3d at 331; E.M. Diagnostic Sys., 812 F.2d at 85.

A. The Store-Access Dispute Does Not Implicate Any Provision of the Collective Bargaining Agreements

Bearing these principles in mind, the court turns to the contracts at issue, which require arbitration of all

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interpret and apply the provisions of this Agreement only insofar as necessary to the determination of [a] grievance" (alteration in original); compare Verizon N.J., 458 F.3d at 311 (concluding that an arbitration clause was narrow because it expressly delineated which disputes were subject to arbitration). A presumption of arbitrability therefore arises with respect to all disputes that implicate a contractual term. This presumption notwithstanding, arbitration is not required for any dispute that fails to relate to a term of the CBAs. Rohm & Haas, 522 F.3d at 332.

grievances unless a dispute "does not involve the interpretation of any provision" of the CBAs. (Doc. 16, CBAs § 11.4.) The court must therefore determine whether the store-access grievances pertain to a provision of the collective bargaining agreements. Local 1776 contends that the grievances relate to the recognition clause, the observation clause, and the privileges clause. The court will evaluate the individual and collective reach of these clauses to determine the cogency of the union's position.

This inquiry is not, as Local 1776 contends, an improper foray into the substantive merits of the grievances. While interpretation of contractual terms is generally a matter reserved to the arbitrator, the Supreme Court has instructed that federal courts may interpret contractual provisions insofar as necessary to resolve the threshold question of arbitrability. See Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 209 (1991) ("Although doubts should be resolved in favor of coverage, we must determine whether the parties agreed to arbitrate this dispute, and we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement." (internal citation and quotation omitted)); AT&T Techs., 475 U.S. 651-52. Indeed, the court "must determine the question of arbitrability, even if that requires [consideration of] the underlying claim." United Food & Commercial Workers Union & Its Locals 450 & 776C v. PPG Indus. Inc., 236 F. App'x 789, 792 n.4 (3d Cir. 2007); accord Litton, 501 U.S. at 209. The party seeking arbitration bears the burden of demonstrating that its grievance falls within the scope of the arbitration clause. Rohm & Haas, 522 F.3d at 332. Merely citing to particular contractual provisions is insufficient to carry this burden. E.M. Diagnostic Sys.,

812 F.2d at 95. Rather, the court must confirm that "the grievance submitted through the . . . grievance procedure . . . arise[s] from some specific article" of the agreement. Rohm & Haas, 522 F.3d at 332; Kaplan v. First Options of Chi., Inc., 19 F.3d 1503, 1516 (3d Cir. 1994) (cautioning that courts should not invoke federal policy favoring alternative dispute resolution as a basis for compelling arbitration of matters beyond the scope of a contractual agreement). The court's role is not to adjudicate the actual existence of the disputed right but instead to determine whether the face of the grievance states a claim that could plausibly implicate a provision of the CBA. Am. Mfg. Co., 363 U.S. at 568; Sharon Steel Corp. Jewell Coal & Coke Co., 735 F.2d 775, 778 (3d Cir. 1984).

Local 1776 claims that these principles apply solely to cases associated with the vesting of certain employee benefits and are therefore inapplicable to the instant dispute. (Doc. 22 at 3-4.) The court, however, does not read Litton and its progeny so narrowly. Litton conducted its arbitrability analysis under the same line of cases that govern this matter, including Warrior & Gulf and AT&T Technologies. Since Litton's issuance, federal courts have applied it in a variety of contexts, including motions to compel arbitration. See, e.g., Int'l Bhd. of Elec. Workers, Local 1 v. GKN Aerospace N. Am., 431 F.3d 624, 628-29 (8th Cir. 2005); Indep. Lift Truck Builders Union v. Hyster Co., 2 F.3d 233, 235-36 (7th Cir. 1993); N.C. Mail Haulers & Postal Labor Local 8001 v. E. Coast Leasing, Inc., No. 1:06CV00840, 2006 WL 30684497, at *3 (M.D.N.C. Oct. 27, 2006); Terre Haute Newspaper Guild, Local No. 46 v. Thomson Newspapers, Inc., 68 F. Supp. 2d 1028, 1032-33 (S.D. Ind. 1999). The court therefore

concludes that Litton furnishes the controlling legal principles here.

Application of Litton is consistent with the Third Circuit's admonition that the grievance at issue must fall within the ambit of the CBA. Rohm & Haas, 522 F.3d at 332. Holding that a grievance does not implicate the terms of a CBA necessarily affects the merits of the underlying claim. Nevertheless, the court may not compel arbitration simply because refusing to do so influences the merits of the dispute. Before compelling arbitration, the court must be satisfied that the dispute actually implicates a contractual term. This inquiry requires the court to "determin[e] whether it [i]s 'possible' for an arbitrator, consistent with the plain meaning of the agreement, to rule in favor of the party demanding arbitration." GKN Aerospace, 431 F.3d at 628. The court will therefore look to the contractual language of the recognition, observation, and privileges clauses to determine whether they are individually or collectively susceptible to an interpretation that creates the store-access right propounded by Local 1776.

1. The Recognition Clause

Recognition clauses frequently appear in collective bargaining agreements in the retail industry and serve several discrete functions. First, the clauses identify the employees who are subject to the collective bargaining agreement. See NLRB v. Greensburg Coca-Cola Bottling Co., 40 F.3d 669, 673 (3d Cir. 1994); United Indus. Workers (Local #16) v. Gov't of the V.I., 987 F.2d 162, 170 n.5 (3d Cir. 1993); Boeing Co. v. NLRB, 581 F.2d 793, 796 (9th Cir. 1978) (holding that a recognition clause defines which

particular people are subject to the contract). The clauses may exempt certain employees from the bargaining unit or exclude a local's national union as a party to the contract. See, e.g., NLRB v. Wooster Div. of Borg Warner Corp., 356 U.S. 342, 345 46 (1958) (recounting that company insisted on a recognition clause that would have excluded the national union as party to the collective bargaining agreement and concluding that absolute insistence on such a provision violated the National Labor Relations Act). Hence, by ratifying a recognition clause, the employer formally acknowledges that the union serves as the collective bargaining agent for all employees within the contractually defined bargaining unit.

Second, recognition clauses may also define matters subject to collective bargaining. The clauses, which generally track language from § 8 of the National Labor Relations Act, may impose an obligation upon the employer to bargain in good faith with the union pertaining to matters enumerated in the clause. See, e.g., Va. Mason Hosp. v. Wash. State Nurses Ass'n, 511 F.3d 908, 915 (9th Cir. 2007) (concluding that arbitrator acted within the scope of his authority when concluding that a recognition clause imposed a contractual obligation to bargain over the conditions of employment). Such matters typically includes wages, hours, and conditions of employment. See 29 U.S.C. § 158(d).

Finally, recognition clauses may restrict an employer's right to insist upon a secret ballot election before recognizing a union as the bargaining representative for stores that the employer opens or acquires after ratification of the CBA. See Houston Div. of the Kroger Co. (Kroger I), 208 N.L.R.B. 928,

928 (1974), rev'd sub nom. Retail Clerks Int'l Ass'n Local No. 455 v. NLRB, 510 F.2d 802 (D.C. Cir. 1975); Houston Div. of the Kroger Co. (Kroger II), 219 N.L.R.B. 388, 389 (1975). This principle derives from the well-settled rule that a union may not automatically induct employees at newly acquired or constructed stores into its ranks without the employees first expressing a desire to be represented by the union. See 29 U.S.C. § 157; Kroger II, 219 N.L.R.B. at 389; Retail Clerks Union, Local 870 (White Front Stores, Inc.), 192 N.L.R.B. 240, 242 (1971). Typically, an employer may demand that employees participate in a secret ballot election before recognizing the union as the bargaining representative at new locations. See 29 U.S.C. § 159(c)(1)(B); U.S. Gypsum Co., 157 N.L.R.B. 652, 656 (1966). However, when a recognition clause appears in a CBA with a preexisting union and expressly addresses after-acquired stores or purports to cover automatically all employees of such stores, the clause operates as a waiver of the employer's secret ballot rights. Kroger II, 219 N.L.R.B. at 389. By ratifying such clauses, the employer agrees to acknowledge the union upon a showing that it possesses the support of a majority of the store's employees.[7] Id.

Despite ample precedent interpreting recognition clauses, Local 1776 has not cited, nor has the court independently identified, any case in which either a

[7] The recognition clause contained in the instant CBAs is substantively identical to one of the clauses at issue in the Kroger decisions. Compare (Doc. 16, CBAs art. 2), with Kroger I, 208 N.L.R.B. at 928. However, it is undisputed that Local 1776 does not currently possess the support of a majority of employees at the Brooks Eckert stores.

federal court or the National Labor Relations Board held that a recognition clause implicated the store-access right sought by the union. The lack of any precedent to this effect is not surprising in light of the well-settled tenet of labor law that an employer may exclude union organizers from its premises when the union possesses alternative access to employees. NLRB v. Babcock & Wilcox Co., 351 U.S. 105, 112 (1956); accord Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 217 n.21 (1994); Metro. Dist. Council of Phila. & Vicinity United Bhd. of Carpenters & Joiners v. NLRB, 68 F.3d 71, 74-75 (3d Cir. 1995); Gary E. Calkins & Anna Rosa Calkins, 323 N.L.R.B. 1138, 1141 (1997), enforced 187 F.3d 1080 (9th Cir. 1999). Local 1776 does not contend that it lacks access to employees outside of the workplace, and Rite Aid therefore incurs no obligation to allow union representatives to enter the Brooks-Eckert stores. Neither the language of the instant recognition clause nor the storied legal history of such clauses indicates that the company's right of exclusion has been compromised through the collective bargaining process. Hence, the recognition clause is not "susceptible of an interpretation that covers the asserted dispute." Warrior & Gulf, 363 U.S. at 582-83.

2. The Observation Clause

Local 1776 next contends that the observation clause creates a right of access to the Brooks-Eckert stores. The observation clause grants the union the right to "enter[Rite Aid's] establishments to *satisfy that th[e] Agreement is being observed*." (Doc. 16, CBAs § 5.1 (emphasis added)). Local 1776 concedes that it does not represent the employees of the Brooks-Eckert stores and that the CBAs do not governed these

individuals' employment. *A fortiori*, the union cannot ensure compliance with the CBAs at a facility to which the contracts do not apply, and the observation clause is facially inapplicable to the present dispute. Hence, the observation clause has no bearing on the union's grievances.

3. The Privileges Clause

Local 1776 lastly relies upon the privileges clause to support its claim of arbitrability. This clause mandates that "[o]nly privileges which have been granted by the present Employer since its acquisition of the establishments covered by this Agreement shall be continued." (Doc. 16, CBAs § 15.3.) The contracts do not define the term "privileges." The court must therefore evaluate whether an arbitrator could interpret the clause in a manner that covers the instant dispute. Warrior & Gulf, 363 U.S. at 583-84; Int'l Bhd. of Elec. Workers, Local 1 v. GKN Aerospace N. Am., 431 F.3d 624, 628-29 (8th Cir. 2005).[5] To be perfectly clear, the court expresses no opinion regarding the *actual* scope of the clause. The court's sole function is to determine whether an arbitrator *could* interpret the clause in a manner that covered the union's grievances. See Graphic Comme'ns

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[5] Local 1776 contends that this inquiry must be submitted to an arbitrator. (Doc. 14 at 6.) This is incorrect. The parties are entitled to a judicial determination on the question of arbitrability, Trap Rock Indus., 982 F.2d at 888, and the court may evaluate the provisions of the CBAs insofar as necessary to dispose of this issue, Litton, 501 U.S. at 209; PPG Indus., 236 F. App'x at 792 ("[A] court may need to decide the merits of the underlying claim in order to decide arbitrators' jurisdiction"). See also supra pp. 10-12.

Conference v. Buck County Courier Times, No. 06-05452, 2008 WL 3889591, *7 (E.D. Pa. Aug. 18, 2008) (observing that "any judicial determination regarding arbitrability should focus only on the agreement").

A court confronted with an ambiguous provision in a collective bargaining agreement looks to the common law of contracts to define the parameters of the term. See Sheet Metal Workers, Local 19 v. 2300 Group, Inc., 949 F.2d 1274, 1284 (3d Cir. 1991). A court must endeavor to interpret the term in a manner consistent with other provisions of the contract, and the context in which the term appears frequently provides a useful device for ascertaining contractual intent. See U.S. Claims, Inc. v. Yehuda Smolar, P.C., -- F. Supp. 2d --, 2009 WL 596459, at *9 (E.D. Pa. 2009); State Farm Mut. Auto. Ins. Co. v. Moore, 544 A.2d 1017, 1019 (Pa. Super. Ct. 1988).

The privileges clause appears in Article 15 of the instant CBAs, which is entitled "Miscellaneous Working Conditions." (Doc. 16, CBAs art. 15.) In the labor law context, *working conditions* is a judicially defined term that "encompass[es] the physical surroundings of a worker at the place of employment." Rohm & Haas, 522 F.3d at 333 (collecting cases). While titles and headings in an agreement are not dispositive of contractual intent, the provisions of Article 15 harmonize with this definition. The article contains a total of fifteen numbered clauses including the privileges clause. Nearly all of these provisions govern the daily rules, regulations, and conditions under which individual employees perform their job functions. For example, the article requires that certain workplace rules be posed for the benefit of

employees, (Doc. 16, CBAs § 15.2), that the company furnish employee uniforms, (id. § 15.5), and that a secure area be provided for storage of employees' personal belongings, (id. § 15.6.2). It delineates the circumstances under which employees may be held personally liable for shortages in cash tills, (id. § 15.6.1), creates procedures for employees to transfer to open positions within a store, (id. § 15.8), and entitles employees to utilize the company's discount policy, (id. § 15.9). Article 15 defines the term "continuous service" for purposes of certain employee benefits, (id. § 15.7), and it establishes regulations for employee compensation, (id. §§ 15.4.1-.4.5). It also obligates the union to issue a union store card to Rite Aid upon verification that the company has complied with the terms of the CBAs. (Id. § 15.1).

The scope of the privileges clause must be construed consistent with its context. Against this backdrop, it is clear that the clause does not, as Local 1776 suggests, transform *any* benefit that Rite Aid confers upon the union into a contractual obligation. Instead, the clause's sister provisions limit its reach. The provisions of Article 15 govern the daily operation of Rite Aid stores and delineate the company's obligations to employees *in the daily performance of their jobs*. The article contains provisions designed primarily to protect employees as individuals and to bring structure to their workplace environment.[5] The

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[5] For example, the privileges clause might address matters such as when employees may go to lunch, whether the company must provide equipment associated with their jobs, or the extent to which they may be assigned tasks outside of their formal job descriptions. Of course, the court provides these examples for

provisions thereof have relatively little effect on the systemic relationship between the union as employees' bargaining representative and the company,[10] and the privileges clause must be read in this light. The court concludes that the reach of the clause is no broader than the quotidian duties and obligations that the other provisions of Article 15 address. Holding that the store-access grievances pertain to the privileges clause would require one to ignore the provision's context and to imbue it with a post-grievance interpretation that is unsupported by the larger framework of collective bargaining. The court will not give such a tortuous reading to this contractual provision. Hence, the site-access grievance does not relate to the privileges clause, and Local 1776 may not invoke it to impose an obligation of arbitrability.

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illustrative purposes only and does not hold that such matters actually fall within the ambit of the clause *sub judice*.

[10] This holding does not trivialize the significance of Article 15 and is merely a reflection of the article's purpose. Certain contractual provisions, such as Article 2 (concerning recognition), Article 4 (concerning union security and dues), and Article 19 (concerning union stewards), delineate the relationship between Rite Aid and Local 1776 as the bargaining representative for dozens of stores and hundreds of employees. Such provisions have relatively little effect upon the manner in which employees discharge their employment duties on a day-to-day basis. The union's alleged right of store access is of this character. On the other hand, Article 15 governs individual employee's daily work environment and leaves the systemic relationship between the union and the company to be addressed by other contractual provisions. The site-access grievance is therefore starkly out of place when inserted among the provisions of this article.

4. The Collective Effect of the Clauses

Local 1776 alternatively argues that the recognition, observation, and privileges clauses collectively create a right of store access even if each clause fails to do so individually. The union has not explained how the scope of these clauses broadens when they are read in tandem, and the court has ascertained no construction of the clauses *in pari materia* which would reach the instant dispute. Accordingly, the court concludes that the store access grievance does not implicate the clauses cited by the union, either individually or collectively. The union's grievances do not "involve the interpretation of any provision" of the CBAs, and Rite Aid is not obligated to submit the instant dispute to arbitration. (Id. § 11.4.)[11]

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[11] Local 1776 contends that referral to arbitration is proper in any event because the appropriate remedy for an arbitral award that exceeds the scope of the CBAs "is a suit to vacate the award, not a judicial order precluding arbitration." (Doc. 21 at 5.) The union cites E.M. Diagnostic Systems and Hartford Aircraft Lodge 743, Int'l Ass'n of Machinists v. Hamilton Sundstrand Corp., 213 F. App'x 31 (2d Cir. 2007), in support of this proposition. These cases are inapposite. In both E.M. Diagnostic and Hamilton Sundstrand, the court concluded that the union's grievance pertained to particular terms of the collective bargaining agreement. Hamilton Sundstrand, 213 F. App'x at 33; E.M. Diagnostic, 812 F.2d at 96. The grievances were referred to arbitration because they required interpretation of a contract term, and the defendant could move to vacate the arbitral awards in the event that the arbitrator exceeded the scope of his or her contractual authority. Here, by contrast, Local 1776 has failed to demonstrate that its grievances implicate a term of the CBAs. *Any* conclusion that the arbitrator reached in the union's favor would be an abuse of the arbitrator's jurisdiction because the CBAs do not grant the arbitrator contractual authority to hear the dispute in the first instance. Hence, E.M. Diagnostic and Hamilton

B. The CBAs Create No Right of Store Access Because Rite Aid and Local 1776 Have Not Bargained About Such Matters

Several additional factors bolster the court's conclusion that the store-access grievances are not arbitrable. First, the CBAs reveal that Rite Aid and Local 1776 contemplated the opening of new stores during the bargaining process yet omitted the store-access rights currently sought by the union. Article 25 of the CBAs provides that Rite Aid "shall have the right *to open new establishments of any kind*[] and to[] transfer, relocate, close or suspend any establishment or operation." (Id. § 25.1.) Article 2.3 of the agreement covering the greater Philadelphia area requires the company to "notify the Union of any new store openings or acquisitions" within the territory covered by the CBA. (Doc. 16, Ex. B § 2.3.) Although boilerplate, these provisions demonstrate that Rite Aid and Local 1776 considered the acquisition and construction of additional stores during the bargaining process. The alleged right to access the Brooks-Eckert stores directly relates to these issues. Had the contacting parties intended to allow the union to enter newly acquired stores, provisions securing a right of access would presumably would appear alongside clauses such as Articles 25 and 2.3. The omission of such safeguards among provisions that would be their kin strongly suggests that Rite Aid and Local 1776 did not intend to create them.

Sundstrand are inapplicable, and the union may not invoke them to compel a futile exercise in arbitration.

Second, ample evidence reflects that unions and employers frequently address property-access rights through the collective bargaining process. In fact, Rite Aid has extended store-access rights on at least one occasion to a sister chapter of Local 1776, as recounted in Rite Aid of N.Y., Inc. v. United Food & Commercial Workers Int'l Union Local One, No. 07 CV-708, 2009 WL 185764 (W.D.N.Y. Jan. 23, 2009). The grievance in Rite Aid of N.Y. arose under circumstances identical to this case. Representatives of the defendant union attempted to enter newly acquired Rite Aid stores following the Brooks-Eckert acquisition and were refused entry. Id. at *2. The union filed a grievance, and Rite Aid sought to stay arbitration. Id. Like in the instant matter, the recognition clause required Rite Aid to apply the CBA to newly acquired and newly opened stores upon a showing of majority support for the union, (Doc. 2, Ex. A § 1.4 in Rite Aid of N.Y., No. 07-CV-708 (W.D.N.Y.)), and the arbitration clause applied to all disputes implicating "questions of the interpretation or application" of CBA provisions, (id. § 19.1).[12] However, the CBA contained an additional clause that granted "[r]epresentatives of the Union . . . the right to visit the Employer's place of business at any time during working hours *for the purpose of whether [sic] the associates wish the Union to represent them* . . . ." (Id. § 25.1.) The court evaluated this express guarantee of store access and concluded that the union's grievance implicated terms of the CBA.

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[12] The court takes judicial notice of the CBA appearing at Exhibit A to Docket Entry No. 2 on the docket for Rite Aid of N.Y., No. 1:07-CV-0708 (W.D.N.Y). See FED. R. EVID. 201(c), (f); Cooper v. Pa. State Att'y Gen., No. 2:06cv1332, 2007 WL 2492726, at *2 (W.D. Pa. Aug. 30, 2007) (reiterating that a federal court may take judicial notice of court records and dockets).

Rite Aid of N.Y., 2009 WL 185764, at *2, 5-6. The pending case is critically distinguishable from Rite Aid of N.Y. in that the present CBAs feature no store-access clause. Whereas Rite Aid of New York required an arbitrator to assess the effect of the store-access clause on the dispute, the present matter contains no similar clause in need of an arbitrator's discerning judgment.[13]

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[13] 1199 SEIU, United Healthcare Workers East v. Rite Aid Corp., No. 07 CV 4816, 2008 WL 762090 (S.D.N.Y. Mar. 24, 2008), also arose in the context of the Brooks-Eckert merger but is unavailing to Local 1776. In 1199 SEIU, Rite Aid and the union were parties to both a CBA and a neutrality agreement, which prohibited the company from impeding unionization efforts. Id. at *1. The CBA, like the agreements at issue here, required Rite Aid to recognize the union as the bargaining representative at new locations upon a showing of support by a majority of employees. Id. The parties agreed that the CBA was in effect at the time of the acquisition but disputed the applicability of the neutrality agreement. Id. at *1 n.2. After the merger, Rite Aid began an anti-union campaign in an attempt to operate newly acquired stores under "a union-free business model." Id. at *1 The union initially challenged the campaign on the ground that it was a breach of Rite Aid's recognition obligations under the CBA, and later asserted that the company's activities violated the neutrality agreement as well. Id. at *3 & n.5. The court noted that applicability of the neutrality agreement was unclear and concluded that the union's grievance concerning Rite Aid's proactive anti-union activity plausibly stated a violation of Rite Aid's recognition obligations under both the CBA and the neutrality agreement. Id. It therefore granted the union's motion to compel arbitration. Id. at *4.

The present matter presents a more tenuous relationship between the express obligations created by the CBA and the store-access right alleged by the union. Unlike 1199 SEIU, in which the parties had entered an express neutrality agreement, Local 1776 contends that a right of store access can be implied

Numerous other sources confirm that unions characteristically bargain for access to an employer's property for the purpose of union organizing. See, e.g., NLRB v. Local 348-S, United Food & Commercial Workers Int'l Union, 273 F. App'x 40, 41 (2d Cir. 2008) (documenting that the union bargained for a neutrality agreement from employer, which included the right to enter employer's premises); Hotel Employees & Rest. Employees Union, Local 57 v. Sage Hospitality Res., 299 F. Supp. 2d 461, 465 (W.D. Pa. 2003) (same); William John Bux & Miranda Tolar, Houston Janitors & the Evolution of Union Organizing, 70 TEX. B.J. 426, 427-28 (2007) (observing that employers typically ratify neutrality agreements—which often incorporate a right of access to the employer's property—in response to union pressure consistent with the bargaining process); Larry W. Bridgesmith & John E.B. Gerth, The Summer of Union Discontent Portends a Season of Employer Discomfort, 39 J. HEALTH L. 117, 130-32 (2006) (same); Adrienne E. Eaton & Jill Kriesky, Union Organizing under Neutrality & Card Check Agreements, 55 INDUS. & LAB. REL. REV. 42, 47 (2001) (reviewing 132 bargained-for neutrality agreements and observing that approximately two-thirds of them included clauses granting unions access to employer property for the purpose of union organizing). Local 1776's union's position that the recognition, observation, and privileges clauses impliedly create store access rights ignores the trend

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from a series of CBA provisions in a manner wholly unsupported by case law. Indeed, neither industry practice nor judicial precedent demonstrates that a right of store access can plausibly be distilled from the contractual provisions identified by the union. See supra Part III.A. Hence, the instant dispute is beyond the realm of both the instant CBAs and 1199 SEIU.

favoring collective bargaining on such matters. As a matter of policy, labor jurisprudence generally regards the right of access to employer property as a matter to be negotiated. If ubiquitous contractual provisions such as recognition clauses created the right Local 1776 now seeks, there would hardly be a need for the extensive store-access bargaining that commentators have chronicled. See Eaton & Kriesky, supra, at 4748. This trend fortifies the court's conclusion that Rite Aid's CBAs are not susceptible to the interpretation proposed by the union.

C. Local 1776's Past Practice Alone Is Insufficient to Establish the Arbitrability of the Store-Access Grievances

Finally, Local 1776 contends that the parties' past practice renders the instant dispute subject to the arbitration clause. Under contract law principles, a court may rely upon past practice to resolve an ambiguity otherwise incapable of resolution or to bring meaning to a provision that "cries out for an implied term." Quick v. NLRB, 245 F.3d 231, 248-49 (3d Cir. 2001) (quoting U.A.W. Local 1697 v. Skinner Engine Co., 188 F.3d 130, 146 (3d Cir. 1999)). However, a party may not invoke extrinsic evidence to "add terms to a contract that *is plausibly complete without them*." Id. (emphasis added) (quoting Skinner Engine Co., 188 F.3d at 146); see also Zylla v. Unisys Corp., 57 F. App'x 79, 85-86 (3d Cir. 2003) (holding that a court should not allow a party to introduce past practice to controvert the language of a contract that is otherwise unambiguous). As discussed above, the recognition, observation, and privileges clauses function as logical, integrated components of the CBAs. The agreements, read as a whole, do not create a contractual ambiguity

that requires resolution through analysis of past practice.[14] Accordingly, the court concludes that Local 1776 may not rely upon such practice to create a right of access to Rite Aid stores when the provisions of the CBAs do not implicate such a right.[15]

IV. Conclusion

The CBAs between Rite Aid and Local 1776 require arbitration of all disputes that require interpretation of a provision thereof. The union's store-access grievances do not relate to the recognition,

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[14] This holding is consistent with the court's assessment of the privileges clause. Although the clause is ambiguous when viewed in isolation, it becomes clear when perceived in the context of Article 15. See supra Part III.A.3. Hence, a full reading of the CBAs demonstrates that the clause does not cover the right of store access alleged by the union, thereby obviating the need for extrinsic evidence. See Gleason v. Norwest Mort., Inc., 243 F.3d 130, 138-39 (3d Cir. 2001) ("Whether a contract is ambiguous depends on the meaning assigned to words or phrases in accordance with the apparent purpose of the contract as a whole.")

[15] Local 1776 apparently presumes that a contractual obligation requiring store access is the *only* rationale for Rite Aid's alleged past practice. However, the union has introduced no evidence to that effect. Rite Aid may have abided past store entry by the union for any number of reasons. The company may have been ignorant of the practice or may have been indifferent to unionization efforts. More likely, perhaps, it chose to vouchsafe a license to access its stores to maintain rapport with the union. Regardless of the reasons underlying the past practice, the instant dispute presents a compelling case of nonarbitrability. The court cannot discard the weight of logic in favor of a pale "flicker of interpretative doubt" that may arise from union's proffered interpretation of ambiguous past practice. Am. Tel. & Tel. Co., 932 F.2d at 216. The parties' past practice alone cannot bring the store-access dispute within the ambit of the CBAs.

observation, or privileges clauses, and the are therefore not "susceptible of an interpretation that covers the asserted dispute." Warrior & Gulf, 363 U.S. at 582-83. This conclusion reflects industry practice of negotiating such rights through the collective bargaining process. The court therefore concludes that the parties have not contractually agreed to arbitrate the instant dispute. Rite Aid's motion for summary judgment will be granted, and Local 1776's motion will be denied.

An appropriate order is attached.

S/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

Dated: March 31, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT
OF PENNSYLVANIA

CIVIL ACTION NO. 1:08-CV-0033

[Filed March 31, 2009]

RITE AID OF PENNSYLVANIA, INC.,	)
	)
Plaintiff	)
	)
v.	)
	)
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776,	)
	)
Defendant	)

(Judge Conner)

ORDER

AND NOW, this 31st day of March, upon consideration of the motions for summary judgment (Docs. 10, 13), and, for the reasons set forth in the accompanying memorandum, it is hereby ORDERED that:

1. The motion for summary judgment (Doc. 10) filed by defendant United Food and Commercial Workers Union, Local 1776 ("Local 1776") is DENIED.

2. The motion for summary judgment (Doc. 13) filed by plaintiff Rite Aid of Pennsylvania, Inc. ("Rite Aid") is GRANTED.

3. The Clerk of Court is instructed to enter JUDGMENT in favor of Rite Aid and against Local 1776 on all claims.

4. The Clerk of Court is instructed to CLOSE this case.

S/ Christopher C. Conner
CHRISTOPHER C. CONNER
United States District Judge

APPENDIX C

AO 450 (Rev. 5/85) Judgment in a Civil Case

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT
OF PENNSYLVANIA

CASE NUMBER 1:08-CV-0033

[Filed March 31, 2009]

RITE AID OF PENNSYLVANIA, INC.,	)
	)
Plaintiff	)
	)
v.	)
	)
UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776,	)
	)
Defendants	)
	)

(Judge Conner)

JUDGMENT IN A CIVIL CASE

( ) **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

✗ **Decision by Court.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED THAT SUMMARY JUDGMENT BE AND IS HEREBY ENTERED in favor of plaintiff RITE AID OF PENNSYLVANIA, INC., and against defendant UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776, on all claims, in accordance with this Court's memorandum and order (Doc. 26), dated March 31, 2009.

Date: March 31, 2009

Mary E. D'Andrea, Clerk of Court
/s/Kimberly A. McKinney
(By) Kimberly A. McKinney, Deputy Clerk

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 09-1989

[Filed March 16, 2010]

RITE AID OF PENNSYLVANIA, INC. Appellant	)
vs.	)
UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 1776,	)

SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

Present: SCIRICA, Chief Judge, SLOVITER, McKEE, RENDELL, BARRY, AMBRO, FUENTES, SMITH, FISHER, CHAGARES, JORDAN, HARDIMAN, GARTH and ROTH[1] Circuit Judges

The Petition for Rehearing filed by Appellant, having been submitted to the judges who participated in the decision of this Court, and to all the other

[1] Senior Circuit Judges Garth and Roth limited to panel rehearing only.

available circuit judges of the circuit in regular active service, along with those judges limited to panel rehearing only, and no judge who concurred in the decision having asked for rehearing , or for filing of an answer, and a majority of the circuit judges in regular active service, along with those judges limited to panel rehearing only, not having voted for rehearing by the court *en banc* or for filing of an answer, the petition for rehearing and for filing of an answer is DENIED. Judge Ambro would grant the petition for rehearing *en banc*.

BY THE COURT,

/S/ Leonard I. Garth
United States Circuit Judge

DATED: March 16, 2010

tmm/cc: Andrew W. Allison Esq.
Darren M. Creasy Esq.
Laurence M. Goodman Esq.
Jonathan B. Sprague, Esq.

No. 09-1530

In The Supreme Court of the United States

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776,

Petitioner,

v.

RITE AID OF PENNSYLVANIA, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Does The Petition Present Any Compelling Reason(s) For Granting The Writ Of Certiorari?

2. Did The Third Circuit Court of Appeals Violate This Court's Arbitrability Case Law By Holding, On The Facts Of This Case, That A Court May Need To Touch Incidentally On The Merits When The Arbitrability Determination And The Merits Are Inextricably Intertwined?

STATEMENT PURSUANT TO RULE 29.6

Rite Aid Corporation is Respondent Rite Aid of Pennsylvania, Inc.'s parent corporation. Rite Aid Corporation owns 10% or more of Rite Aid of Pennsylvania, Inc.'s stock.

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COUNTERSTATEMENT OF THE CASE

Rite Aid of Pennsylvania, Inc., hereby incorporates by reference and adopts the recitation of facts set forth in the opinion of the United States Court of Appeals for the Third Circuit in *Rite Aid of Pa., Inc. v. United Food and Commercial Workers Union, Local 1776*, 595 F.3d 128, 137 (3d Cir. 2010).

REASONS FOR DENYING THE WRIT

I. The Petition Does Not Present Any Compelling Reason(s) For Granting The Writ Of Certiorari

Supreme Court Rule 10 provides that "review on a writ of certiorari is not a matter of right, but of judicial discretion" and that "certiorari will be granted only for compelling reasons." Rule 10 further states that such "compelling reasons" may only be found to exist where a United States Court of Appeals has rendered a decision that conflicts with a decision of another United States Court of Appeals in the same important matter; a United States Court of Appeals has decided an important federal question in a way that conflicts with the decision by the highest court of a state; or, a United States Court of Appeals has decided an important issue of federal law in a way that conflicts with the decisions of this Court. Rule 10 further states that "[a] petition for writ certiorari is rarely granted when the asserted error

consists of erroneous factual findings or the misapplication of a properly stated rule of law."

The United Food and Commercial Workers Union, Local 1776's ("Union") Petition for Writ of Certiorari ("Petition") does not state any "compelling reasons" for granting certiorari. Although Rule 10's reasons are not exclusive, this Court has held that it should "be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923). No "conflict of authority," embarrassing or otherwise, exists.

First, the Union's Petition fails to identify *any* circuit court conflict. As this Court recognized, "[a] principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991).

The Union does not attempt to allege a split in circuit court authority on the arbitrability-merits question. In fact, the Union's Petition concedes exactly the opposite: namely, that "the Third Circuit's holding in this case is the latest in a *growing body of decisions* from the Circuit Courts of Appeals that

have permitted an examination of the merits of the grievance to determine arbitrability despite the presence of a broad arbitration clause in an existing contract." (Union Petition, at 13-14) (italics added) (citing *IBEW v. GKN Aero. N. Am., Inc.*, 431 F.3d 624 (8th Cir. 2005) and *Independent Lift Truck Builders Union v. Hyster Co.*, 2 F.3d 233 (7th Cir. 1993)).

The Third Circuit, as does the Union, also recognized that the overwhelming majority of courts, both before and after *Litton Financial Printing Div. v. NLRB*, 501 U.S. 190 (1991), have held that the threshold judicial responsibility to determine arbitrability may, when merits and arbitrability are intertwined, trump the rule prohibiting consideration of the merits. *Rite Aid of Pa., Inc. v. United Food and Commercial Workers Union, Local 1776,* 595 F.3d 128, 137 (3d Cir. 2010) ("*Rite Aid* Decision") (collecting cases from the First, Third, Sixth, Seventh and Eighth Circuit Courts of Appeal, spanning more than thirty years). Rather than representing a "break" from circuit court authority, the *Rite Aid* Decision represents a *continuation* of long-time, well-entrenched case law.

Second, the *Rite Aid* Decision is not only consistent with a uniform body of circuit court case authority, the Third Circuit holding adheres to *Litton*. Courts have, almost without exception, read *Litton* as instructing "that the judicial responsibility to determine arbitrability takes precedence over the general rule to avoid consideration of the merits of a grievance." *IBEW*, 431 F.3d at 628. As the Seventh Circuit

explained *Litton*: "If the court must, to decide the arbitrability issue, rule on the merits, **so be it**." *Hyster*, 2 F.3d at 236 (bold type added).

Litton, however, explains itself best without the slightest suggestion that its broad judicial duty-to-determine-arbitrability holding was, in any way, narrowly limited to an expired collective bargaining agreement:

> Although doubts should be resolved in favor of coverage, we must determine whether the parties agreed to arbitrate this dispute, and **we cannot avoid that duty because it requires us to interpret a provision of a bargaining agreement**.

Litton, 501 U.S. at 209 (bold type added, internal citation and quotation omitted).

Litton did not hesitate to resolve the underlying merits dispute over the proper interpretation of a contractual provision because resolving that dispute was necessary to determine whether the grievance was arbitrable. Over the years, many courts have interpreted *Litton* to mean that the judicial responsibility to determine arbitrability takes precedence over the rule that courts may not decide the merits of an underlying dispute. *See Luden's Inc. v. Local Union No. 6*, 28 F.3d 347, 353-54 n.10 (3d Cir. 1994) (collecting cases). The *Rite Aid* Decision follows in a long line of circuit court decisions, which have read *Litton* as allowing consideration of merits when necessary to determine arbitrability.

Last, this case involves a minor contract dispute over arbitrability, the resolution of which is of no importance to anyone other than the immediate parties. The Union's Petition recognized as much when it labeled its dispute with Rite Aid as a "garden variety labor relations dispute" – one involving an "ordinary labor dispute over the meaning of contract language. . . ." (Union Petition, at 15, 17).

The Union argues, moreover, that the Third Circuit misapplied *Litton*. (Union Petition, at 13) ("Litton is plainly inapposite because it arises in a completely different context from the present case."). The mere misapplication of a rule of law rarely if ever constitutes grounds for the granting of a petition for a writ of certiorari. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the **misapplication of a properly stated rule of law**.") (bold type added).

This Court should deny the Union's Petition because (1) no split of circuit court authority exists (or is even alleged); (2) the *Rite Aid* Decision falls well within a long line of mainstream decisions that have properly and uniformly applied *Litton*; and, (3) the Union's contention that the Third Circuit misapplied *Litton* constitutes insufficient grounds upon which to grant a Petition. In sum, the Union has not supplied

a single *compelling* reason to grant its unexceptional Petition.

This Court therefore should deny the Petition.

II. The Third Circuit Court of Appeals Did Not Violate This Court's Arbitrability Case Law By Holding, On The Facts Of This Case, That A Court May Need To Touch Incidentally On The Merits When The Arbitrability Determination And The Merits Are Inextricably Intertwined

The Union asserts that the Third Circuit "departed completely" from this Court's "required" arbitrability analysis under *AT&T Technologies, Inc. v. Communication Workers of America*, 475 U.S. 643, 651 (1986) ("*AT&T*"). (Union Petition, at 11). The Union complains that the Third Circuit lost "analytical focus" when the Court of Appeals refused to limit its arbitrability analysis to whether the grievance's subject matter fell within the arbitration clause's scope. *Id.*

To the Union, determining arbitrability is a simple, straightforward matter: if a party to an agreement merely alleges violation of that agreement, then the grievance is *per se* arbitrable. (Union Petition, at 11) (citing *United Steel Workers of America v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960)). The Union's ban on any consideration of the merits when determining arbitrability is absolute – one admitting no exceptions. In sum, "we grieved,

ergo we arbitrate." Neither life nor law, however, is that simple.

The Union self-servingly assumes that courts can *invariably* determine arbitrability without ever touching on the merits. The Union's merits-ban position, however, ignores (or slights) both the "hard" cases in which the merits are inextricably bound-up with arbitrability and the paramount *judicial* responsibility to determine arbitrability.

Ironically, had the Third Circuit adopted the Union's absolute merits-ban rule, that court would have "departed completely" from two fundamental principles of arbitration jurisprudence. First, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that it has not agreed to submit. Second, whether a contractual duty to arbitrate exists is "undeniably" an issue for *judicial* determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, *not* the arbitrator. *AT&T*, 475 U.S. at 648-49. *The Union's Petition conveniently fails to mention these two fundamental arbitration precepts.* (Union Petition, at 10-11).

The practical effect of the Union's absolute merits-ban position is that arbitrators – not courts – will determine arbitrability, despite contract language to the contrary. The Union, in effect, seeks nothing less than the judicial "repeal" of the two *AT&T* arbitration precepts that it omitted from its

Petition: (1) the rule against forcing parties to arbitrate absent an agreement to arbitrate; and, (2) the rule making courts, *not* arbitrators, determiners of arbitrability. *AT&T*, 475 U.S. at 648-51 (*all* four arbitration precepts discussed).

The Union picks and chooses which arbitration precepts to emphasize, and which to ignore. The Union would make absolute the rule prohibiting courts from touching upon the merits when determining arbitrability. This rule, however, is not as absolute as the Union represents (or would like).

This Court recognized over twenty years ago that "[i]t is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances. . . ." *AT&T*, 475 U.S. at 651. Just as courts may not assume federal jurisdiction based on "insubstantial" or "implausible" federal claims, courts may not refer *all* disputes to an arbitrator merely on one party's say-so – without first deciding whether the grievance claim is, in fact, arbitrable. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (federal question jurisdiction).

This case highlights the tension between two fundamental arbitrability precepts. On one hand, courts decide arbitrability. On the other hand, courts, when deciding arbitrability, may not rule on the potential merits of the underlying claim. *AT&T*, 475 U.S. at 649.

This tension, however, is "often more apparent than real." *Independent Lift Truck Builders Union v.*

Hyster Co., 2 F.3d 233, 236 (7th Cir. 1993)). Following *Litton*, the Seventh Circuit (like many other Circuits) resolved the tension in favor of the judicial determination of arbitrability even when the merits are decided in the process: "It appears, then, that the rule that courts must decide arbitrators' jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute. If the court must, to decide the arbitrability issue, rule on the merits, so be it." *Hyster*, 2 F.3d at 236 (underlining added).

This Court should ignore the Union's "Chicken Little" warning that the *Rite Aid* Decision will result in the "unprecedented enlargement" of the federal court role in arbitration matters leading to disruption of the "stability of labor/management relations." (Union Petition, at 14). The *Rite Aid* Decision is far from "unprecedented." *Litton* and its progeny have been the law of the land for almost twenty years and the "sky has not fallen."[1]

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[1] The name "Chicken Little" and/or the phrase, "the sky is falling," are often used as references to a hysterical or mistaken belief that catastrophe is imminent. *See, e.g., Fair Housing Council of San Fernando Valley v. Roommates.Com*, LLC, 521 F.3d 1157, 1176 (9th Cir. 2008); *Barton v. Horowitz*, No. Civ. 97 N 1980, 2001 WL 35710605, *2 (D. Colo. March 31, 2001) (opinion not available on LEXIS) ("As for Barton's Chicken-Little-esque prognostication that the court's March 6, 2000, Order is a harbinger that the sky is falling, he may rest assured that the court's Order will not sound the death knell for arbitration as we know it.").

The *Rite Aid* Decision joins a long line of post-*Litton* case law holding that the "judicial responsibility to determine arbitrability takes precedence over the general rule to avoid consideration of the merits of a grievance." *IBEW*, 431 F.3d at 628. The overwhelming post-*Litton* "prevailing view" obligates courts to address the merits of a grievance dispute if necessary to determine arbitrability. *Crown Cork & Seal Co., Inc. v. International Association of Machinist and Aerospace Workers*, 501 F.3d 912, 917 (8th Cir. 2007) (judicial responsibility to determine arbitrability trumps general rule to avoid consideration of merits); *Stevens Construction Corp. v. Chicago Regional Counsel of Carpenters*, 464 F.3d 682, 686-87 (7th Cir. 2006) (same); *International Chemical Workers Union Counsel v. PPG Industries, Inc.*, 236 Fed. Appx. 789, 793 n.4 (3d Cir. 2007) ("[W]e choose to accept the duty dictated by *Litton*. We must determine the question of arbitrability, even if that requires us to consider the underlying claim."); *IBEW*, 431 F.3d at 628 ("These decisions resolved the question of arbitrability differently, but the courts agreed that judicial review was required at least to the point of determining whether it was 'possible' for an arbitrator, consistent with the plain meaning of the agreement, to rule in favor of the party demanding arbitration."); *Hyster*, 2 F.3d at 236 ("It appears, then, that the rule that courts must decide arbitrators' jurisdiction takes precedence over the rule that courts are not to decide the merits of the underlying dispute. If the court must, to decide the arbitrability issue, rule on the merits, so be it."); *Luden's Inc.*, 28 F.3d at

353-54 n.10 (collecting cases reading *Litton* as having impliedly overruled the general rule that a court, in determining arbitrability, may not look to the merits of the underlying claim).

The *Rite Aid* Decision simply recognized that courts, if they are properly to discharge their judicial responsibility to determine arbitrability, must sometimes address the merits, especially when arbitrability and merits are inextricably intertwined. The *Rite Aid* Decision is not radical, new, or unprecedented. And the sky has not fallen.

The Union's arguments, moreover, are disingenuous. The Union *disregards* the fundamental rule that courts, not arbitrators, determine arbitrability. The Union *disregards* cases where merits and arbitrability issues are inextricably intertwined and arbitrability cannot be determined without reaching the merits. The Union *assumes* the rule prohibiting consideration of the merits is *absolute* – admitting of no exception, anytime or anywhere. That is not the law, nor should it be. *Rite Aid of Pa., Inc.*, 595 F.3d at 136 ("The Union additionally argues that the District Court impermissibly considered the merits of its grievance in making its arbitrability determination. We cannot agree. Decisions of the Supreme Court and Courts of Appeals have made clear that where the merits and arbitrability questions are inextricably intertwined, a court's arbitrability decision may, of necessity, touch incidentally on the merits.").

The practical effect of the Union's uncompromising and inflexible "merits-ban" position is the *de facto* substitution of arbitrators for courts in making arbitrability determinations. The end result is the subversion of the general rule that arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute that it has not *agreed* to submit.

The actual question presented is not, as the Union represents, whether *Litton* conforms to the *Steelworkers Trilogy*. (Union Petition, at i). Rather, the **true** question presented is whether this Court should **overrule** *AT&T* and the *Steelworkers Trilogy* to the extent those decisions hold that arbitration is a matter of contract, and determinations of arbitrability a judicial responsibility. The Union's position, if adopted wholesale, would turn the *Steelworkers Trilogy* and *AT&T* on their collective heads, make arbitrators judges, and compel parties to arbitrate matters they never agreed to arbitrate.

This Court should deny the Union's Petition.

CONCLUSION

For the reasons set forth above, Rite Aid of Pennsylvania, Inc., respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 09-1530

In the
Supreme Court of the United States

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 1776,
Petitioner,

v.

RITE AID OF PENNSYLVANIA, INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In this case, the Third Circuit held that a federal district court can review the merits of a grievance brought under a broad arbitration clause of an existing collective bargaining agreement when determining whether that grievance is arbitrable, even though that result is directly contrary to fifty years of this Court's precedent. Respondent opposes the Petition by misstating Petitioner's contentions to this Court, and by ignoring this Court's recent decision in *Granite Rock v. International Brotherhood of Teamsters*, 561 U.S. ___, 2010 U.S. LEXIS 5255 (June 24, 2010).

A. Respondent Misstates The Issue for Review

The central question raised by the instant Petition is *the process* by which a court faced with an arbitrability dispute determines whether the subject matter of the grievance is encompassed by the arbitration clause. Contrary to Respondent's contentions, Petitioner has not "ignored" the "precepts" set forth by this Court in *AT & T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), because Petitioner did not restate the Court's rule that a court, and not an arbitrator, is the proper entity to resolve questions of arbitrability. *See* Respondent's Brief in Opposition ("BIO") at 7-8. Indeed, Petitioner has never disputed that it is the federal court's job to determine whether grievances arising under a collective bargaining agreement ("CBA") are arbitrable.

Rather, the issue is *how* the court below resolved that question – *i.e.*, by undertaking a detailed review

of the merits of the grievances, and deciding arbitrability with reference to the court's evaluation of the merits. Contrary to Respondent's claim, the Union is *not* arguing that "'we grieved, ergo we arbitrate.'" BIO at 6-7.

Instead, the Petition contends that the court below should have followed the *method* this Court described in *AT&T Technologies* – *i.e.*, applying a presumption of arbitrability "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute," *without regard* to the "potential merits of the underlying" grievance. 475 U.S. at 649-50. Thus, as Justice Brennan observed in *AT&T Technologies*, the arbitrability question to be determined by a court is "'strictly confined,' . . . to whether the parties agreed to submit disputes over the meaning of [the disputed contractual clause] to arbitration." 475 U.S. at 654 (Brennan, J., concurring) (citation omitted).

In view of *AT&T Technologies*, the only question the court below should have asked was whether it could say, "with positive assurance," that the arbitration clause excluded disputes concerning the contractual provisions cited by the Union from consideration by an arbitrator. Instead of making that inquiry, both the District Court and the Third Circuit engaged in a detailed analysis of the contractual provisions relied on by the Union in support of its greivances, and concluded that the Union's arguments were without merit.

In so doing, the Third Circuit has essentially "flipped" the legal presumption that grievances which facially assert a violation of a collective bargaining

agreement ("CBA") are arbitrable, *see United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564, 568 (1960), with one requiring unions to demonstrate that its grievance is arguable, if not non-frivolous. Such a result is plainly at odds with this Court's holding in *American Manufacturing*: "The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious. . . . When the judiciary undertakes to determine the merits of a grievance under the guise of interpreting the grievance procedure of a collective bargaining agreement, it usurps a function which under that regime is entrusted to the arbitration tribunal." 363 U.S. at 568-69.

Nothing this Court said in *Litton Financial Printing Division v. National Labor Relations Board*, 501 U.S. 190 (1991), or its progeny, has indicated that the rules first enunciated in *American Manufacturing* are overruled when interpreting arbitration agreements contained in existing collective bargaining agreements. Accordingly, the Petition should be granted in order to harmonize the Court's decisions in *AT&T Technologies* and *Litton Financial Printing*.

B. Precedent Decided Subsequent to this Petition Supports Review

This Court issued its decision in *Granite Rock* on June 24, some three weeks before Respondent filed the BIO. Nevertheless, Respondent avoids citing or discussing *Granite Rock*, or its impact on this case, even though the Court in that case decided it was necessary to "reemphasize the proper framework for

deciding when disputes are arbitrable under our precedents." 2010 U.S. LEXIS at *20.

In *Granite Rock*, this Court reiterated that: "a court may order arbitration of a particular dispute only where the court is satisfied that the parties agreed to arbitrate *that dispute*." *Id.* (emphasis in original). The federal courts "discharge this duty by: (1) applying the presumption of arbitrability only where a validly formed and enforceable agreement is ambiguous about whether it covers the dispute at hand; and (2) adhering to the presumption [of arbitrability] and ordering arbitration only where the presumption is not rebutted." *Id.* at *27-28.

Applying this test, the Third Circuit should have ordered arbitration of the Union's grievances. First, there is no question but the parties have a "validly formed and enforceable agreement to arbitrate." Further, that agreement, which specifically permits arbitration of grievances "involving the interpretation of any provision of this agreement" is a broad one, App. A. 8a, 25a, and plainly covers the Union's grievance which is based on the Union's interpretation of three specific provisions of the contract, App. A., 9a (Article 2.1 of CBA); 12a (Article 5.1 of CBA) and 13a (Article 15.3 of CBA). *See Granite Rock*, 2010 U.S. LEXIS at *33 ("the CBA's arbitration clause, which pertains only to disputes 'arising under' the CBA and thus presupposes the CBA's existence, would seem to plainly to cover a dispute that 'arises under' a specific substantive provision of the CBA").

As the foregoing demonstrates, *Granite Rock* restated and refined *AT&T Technologies'* test for determining how a court is to resolve a challenge to

the substantive arbitrability of a grievance. The Court did not, however, in any way modify the presumption governing the arbitrability of grievances arising out of an existing CBA with an undisputedly broad arbitration clause: such grievances are deemed arbitrable, without an inquiry into the merits of the grievance. Indeed, although the Court determined that an alternative argument was not properly preserved, Justice Sotomayor correctly observed in dissent that "this Court has been emphatic that 'courts . . . have no business weighing the merits of the grievance'" when determining arbitrability. *Granite Rock*, 2010 U.S. LEXIS at *56 (Sotomayor, J., dissenting) (*citing American Manufacturing*, 363 U.S. at 568).

C. The Court Should Grant, Vacate and Remand the Matter in Light of *Granite Rock*

The Third Circuit did not have the benefit of *Granite Rock's* refinement of the *AT&T Technologies'* test when it issued its decision below. As a result, instead of applying the presumption of arbitrability to determine whether Rite Aid and the Union "agreed to arbitrate *th[e] dispute*," 2010 U.S. LEXIS at *20, over whether Rite Aid's conduct had violated specified provisions of the CBA, the court below improperly placed the burden of proving arbitrability on the Union. Accordingly, Petitioner should have the opportunity to present this dispute to the Third Circuit, utilizing the further guidance provided by this Court in *Granite Rock*. Under these circumstances, the Court should grant the petition for a writ of certiorari, vacate the court of appeal's judgment, and

remand for further consideration (GVR) in light of *Granite Rock*.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certoriari, the petition for a writ of certiorari should be granted and the case should be set for full briefing and argument. In the alternative, the petition for a writ of certoriari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration in light of *Granite Rock Co. v International Brotherhood of Teamsters*, 561 U.S. ___, 2010 U.S. LEXIS 5255 (June 24, 2010).

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